Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 75-1885

THOMAS D. McDONALD,
Petitioner,

V.

THE STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF ALABAMA

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THE STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF ALABAMA

Petitioner prays that a writ of ceritorari issue to review the judgment of the Court of Criminal Appeals of Alabama entered in that certain action styled Thomas D. McDonald, Appellant, vs. State of Alabama, Appellee, on May 27, 1975, affirming the judgment entered March 7, 1974, by the Circuit Court of Madison County, Alabama, convicting Petitioner of accepting a bribe, and sentencing him to three years imprisonment in the State Penitentiary as punishment.

OPINIONS BELOW

The judgment and opinion of the Court of Criminal Appeals of Alabama which Petitioner prays this Court to re-

view have not been reported to Petitioner's knowledge, but the opinion is set out in the Appendix to this Petition, *infra*, at 6a. A timely application for rehearing was filed by Petitioner and was denied by the Court of Criminal Appeals on June 30, 1975. The order of the Court of Criminal Appeals denying rehearing, and the dissenting opinion of Mr. Justice Bookout of that Court appears in the Appendix, *infra*, at 27a. Petitioner filed a timely petition in the Supreme Court of Alabama for writ of certiorari to review said judgment and opinion of the Court of Criminal Appeals, and, on September 30, 1975, the Supreme Court of Alabama granted the petition and issued the Writ to the Court of Criminal Appeals. The order of the Supreme Court of Alabama granting the Writ as prayed in the Petition is included in the Appendix, *infra*, at 35a. On April 9, 1976, the Supreme Court of Alabama entered an order quashing the Writ, and denying the Petition, but with no opinion. The order is set out in the Appendix, *infra*, at 36a.

JURISDICTION

The judgment of the Court of Criminal Appeals of Alabama of which Petitioner seeks review was entered on May 27, 1975, and a timely petition for rehearing was denied on June 30, 1975. A timely petition to the Supreme Court of Alabama for discretionary review of the judgment of the Court of Criminal Appeals by writ of certiorari was granted on September 30, 1975. The petition for certiorari was orally argued on the merits before the Supreme Court of Alabama on November 10, 1975, and the cause submitted to the Supreme Court on briefs and oral argument. On April 9, 1976, the Supreme Court of Alabama entered an order quashing the writ of certiorari it had theretofore issued to the Court of Criminal Appeals of Alabama, but

with no opinion. No application for rehearing of a petition for certiorari will be received by the Alabama Supreme Court if a petition for certiorari to a lower appellate court is denied.[1]

The Court of Criminal Appeals of Alabama has exclusive and final appellate jurisdiction of all judgments of conviction of misdemeanors and of felonies.[2] The Supreme Court of Alabama has no appellate jurisdiction in criminal cases, but it is the highest state court of Alabama, and it has and exercises the power of superintendence and control over all lower courts of the State, including the Court of Criminal Appeals of Alabama. Review of decisions of lower appellate courts by the Alabama Supreme Court is discretionary only.[3]

The Supreme Court of the United States has jurisdiction of this Petition for Writ of Certiorari under 28 U.S.C. §1257(3), in that Petitioner sets up and claims rights and privileges under Amendment XIV to the Constitution of the United States and under Amendment XIII to the Constitution of the United States.

QUESTION PRESENTED

Were Petitioner's conviction and sentence to imprisonment in violation of Amendment XIV and/or Amendment XIII to the Constitution of the United States, because of no relevant legal evidence of the existence of one or more constituent elements of the crime charged in Count One of the indictment, under which Petitioner was convicted of accepting a bribe?

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[1]Rule 39(j), Alabama Rules of Appellate Procedure, 1975.

[2]Code of Alabama 1940 (Recompiled 1958) Title 13, §111(2).

[3]Rule 39, Alabama Rules of Appellate Procedure, 1975.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment XIV

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment XIII

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States, ... "

Statute

Code of Alabama 1940 (Recompiled 1958), Title 14, §64.

Accepting bribe by . . . officer.

"Any legislative, executive or judicial officer or any municipal officer, or any deputy officer, or the clerk, agent or employee of any such legislative, executive, judicial or municipal officer who corruptly accepts or agrees to accept any gift, gratuity, or other thing of value, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his act, vote, opinion, decision or judgment is to be given in any particular manner, or upon any particular side of any cause, question, or proceeding, which is pending or may be by law brought before him in his official capacity: Or that he is to make any particular appointment in his

official capacity, shall on conviction, be imprisoned in the penitentiary for not less than two years or more than ten years."

STATEMENT OF THE CASE

A.

THE FACTS

Petitioner was indicted by the Grand Jury of Madison County, Alabama, on May 23, 1973 (R-2).[4] The indictment contained four counts, but the case was submitted to the jury by the trial judge on Count One of the indictment only,[5] which reads:

> "Thomas D. McDonald, alias Tom McDonald, a judicial officer, to-wit: Judge of the Madison County Court, Huntsville, Madison County, Alabama, did in, to-wit: December, 1971, in or near the office of the said Thomas D. McDonald, alias Tom McDonald, in the Courthouse of Huntsville, Madison County, Alabama, unlawfully and corruptly accept or agree to accept a gift, gratuity, or other thing of value, or a promise to do an act beneficial to the said Thomas D. McDonald, alias Tom McDonald, to-wit: Sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship from one Myra Layton Braidfoot, alias Myra Braidfoot Layton, a woman, under an agreement or with an understanding that his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, question, or proceeding, which by law was pending before him in his official capacity, to-wit: The cause, question or proceeding being a criminal

[4]Reference is here made to the page number of the transcript of the record of the proceedings in the trial court which was filed on Petitioner's appeal to the Court of Criminal Appeals of Alabama.

[5]Unless otherwise indicated, the facts are stated in the opinion of the Court of Criminal Appeals of Alabama. Appendix, *infra*, at 6a.

prosecution of said Myra Layton Braidfoot, alias Myra Braidfoot Layton, wherein the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, was charged with Grand Larceny under the laws of the State of Alabama, and said criminal prosecution being otherwise identified as the State of Alabama vs. Paul Duane Braidfoot, Myra Layton Braidfoot, Defendants, Case No. 97467, Madison County Court, Huntsville, Madison County, Alabama, and that the said Thomas D. McDonald, alias Tom McDonald, as Judge of the Madison County Court, Huntsville, Madison County, Alabama, would dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, reduce or cause to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial to the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, all against the peace and dignity of the State of Alabama."

The above quoted Count was drawn under Section 64 of Title 14 of the Code of Alabama 1940 (Recompiled 1958), quoted, *infra*, in full.

There was a jury verdict finding the Defendant guilty as charged in Count One of the indictment. Appendix, *infra*, at 1a. He was sentenced to imprisonment in the State Penitentiary for three years as punishment for the alleged crime. Appendix, *infra*, at 1a.

Myra Braidfoot, the prosecuting witness for the State, and the person with whom the State charged that the Petitioner had an agreement to accept a "thing of value", in the form of sexual intercourse, or the promise of sexual intercourse, as consideration for the judicial favors the indictment alleges the Petitioner agreed to give her, was a young woman who was 22 years of age when Petitioner was tried (R-15). She was 19 years of age at the time of the crime charged, and, by the time of trial, she had been married five times (R-189). She had been convicted of three felonies (forgery) and of larceny (R-211, 214). She was on probation from the forgery sentences (R-211) and had been a police informer (R-211-212).

According to the records of the Madison County Court, of which Petitioner was Judge in November 1971 and December 1971, Myra Braidfoot was charged by affidavit and warrant in the Madison County Court with grand larceny and arrested on the charge on November 19, 1921.[6] She was represented by an attorney, Mr. Ralph Slate, of Decatur, Alabama. On December 16, 1971, Petitioner set bail at $2,000, and Mrs. Braidfoot demanded a preliminary hearing.[6] On December 22, 1971, Mrs. Braidfoot withdrew her demand for preliminary hearing and waived her case to the grand jury.[6] Petitioner reset bail at $750.[6]

The Madison County Court was vested with preliminary jurisdiction only in felony cases. The Court lost all further jurisdiction over the Braidfoot case when it was waived to the grand jury. The Madison County Grand Jury later returned a grand larceny indictment in the case against Mrs. Braidfoot, but the indictment was nol-prossed in the Circuit Court of Madison County by the District Attorney.

Irrespective of what Petitioner's conduct may or may not have been with other women, the State's case against the Petitioner rested exclusively on the testimony of Myra Braidfoot for prima facie proof of the constituent elements of the offense charged in the indictment. Such was recognized by the Alabama Court of Criminal Appeals in its opinion. Appendix, *infra*, 26a.

Mrs. Braidfoot testified that between November, 1971, and December, 1971, she appeared in Petitioner's court three times, all of which were in connection with her grand larceny case then pending in the court. On the first occa-

[6]"Criminal Docket and Fee Book", of the Madison County Court (Defendant's Exhibit 1, R-200, 1462).

sion, the court bailiff told her the Petitioner wished to see her in his chambers. She went to Petitioner's chambers and sat on a couch. Petitioner sat in a chair behind his desk. Petitioner commented on "how attractive (she) was." She recalled nothing further regarding the conversation or the incident.

Mrs. Braidfoot further testified that on the occasion of her second appearance in Petitioner's court she was again in his chambers and Petitioner again remarked upon "how attractive (she) was." She recalled nothing further of the conversation or of the incident.

The gist of Mrs. Braidfoot's testimony pertaining to the third and last occasion she appeared in Petitioner's court was contained in her testimony on direct examination by the State, and is set out in the opinion of the Alabama Court of Criminal Appeals. It is as follows:

> "Q. What happened the third time, please ma'am?
> "A. Well, we were in his Chambers again, and as we were getting up to leave he asked me if I could meet him at Kings Inn at 10:00.
> "THE COURT: Asked you what?
> "A. If I could meet him at Kings Inn at 10:00.
> "Q. The Defendant asked her if she could meet him at the Kings Inn at 10.00.
> "THE COURT: All right. I'm just a little hard of hearing.
> "Q. Did he touch you or anything that time, squeeze you?
> "A. He put his arm around my waist.
> "Q. This Defendant, Thomas McDonald?
> "A. Yes, sir.
> "Q. And were you alone in his office?
> "A. Yes, sir.

> "Q. And what again did he say now, other than meeting him at the Kings Inn?
> "A. He said if I met him at Kings Inn we could talk about the situation and maybe take care of it.
> "Q. Of the case?
> "A. Yes, sir.
> "Q. All right. If you met him at Kings Inn at 10:00, what did you tell him?
> "A. I told him that I would." (Appendix, *infra*, 9a)

On cross-examination, Mrs. Braidfoot said that Petitioner continued one of the court appearances in her larceny case because of the absence of her attorney (R-198). She said that her lawyer did not appear in court on any of the three occasions her case was set and she saw Petitioner (R-199), but after the third occasion, "he came with me" and "had it (the case) transferred over into another court." (R-199). She told her attorney about the incident on "the very same day, about an hour after that." (R-207). She did not have sexual intercourse with Petitioner (R-210); Petitioner did not ask her to have sexual intercourse with him (R-210); she "did not promise him sexual intercourse" (R-210); and she did not propose to Petitioner that, if he would take some specific action in her case, she would have sexual intercourse with him (R-211).

On redirect examination, Mrs. Braidfoot testified, with reference to the third and last occasion she saw Petitioner in connection with her larceny case that:

> "He just told me how attractive I was, and when we got up to leave he asked me if I would meet him at Kings Inn at 10:00, and we would look over the situation *or* the case." (R-219-220)

Mrs. Braidfoot testified that "10:00" referred to 10:00 o'clock A.M. (R-204, 207). The Kings Inn is a motel in Huntsville, Alabama (R-216-217). It is a motel and a res-

taurant, and "there is a club there that is also a restaurant." (R-1063).

Mrs. Braidfoot said that she told no one except her attorney of the alleged third occasion she saw Petitioner in his Chambers until she was questioned about it by Mr. Bob Eddy, a Deputy Sheriff of Madison County, Alabama, "within a couple of months before (she) testified to the grand jury." (R-213).

There was no other evidence of the corpus delicti of the crime charged in the indictment, although the State was permitted, over Petitioner's strenuous objection, to offer evidence of sexual misconduct on his part, and of conduct with sexual connotations, with four other women who had had business with, or who had been charged with criminal offenses in, Petitioner's court, at various times. Such evidence is summarized in the opinion of the Alabama Court of Criminal Appeals. (Appendix, *infra*, 13a-23a). The evidence consists of the testimony of Brenda Gwathney, Cheryn Forsythe, Laura Blann, and "Anonymous", a witness whose anonymity was preserved.

Brenda Gwathney had been convicted of three charges of issuing worthless checks, with intent to defraud (R-399; R-414-418). Cheryn Forsythe had been convicted of forgery (R-273-275) and in 28 cases of issuing worthless checks with intent to defraud (R-329-332; R-1468; Defendant's Exhibits 8, 10, 14, 15, 18, 19, 20, 21, 22). She had been a police informant (R-276, 302). Cheryn Forsythe testified that she had twice testified to the grand jury under oath differently than she did at Petitioner's trial, that she was angry with Petitioner when she testified before the grand jury to the facts testified to at Petitioner's trial (R-304-307), and that she hoped to benefit from her testimony at the trial (R-314). Laura Blann had been convicted in the United States District Court of interstate transportation of

forged securities (R-456), and she was a federal prisoner at the time of Petitioner's trial (R-457). Laura Blann had also been convicted in two forgery cases (felonies) in Alabama (R-495).

Before the jury retired to consider its verdict, the trial judge instructed the jury, in accord with Alabama law, that a crime involving moral turpitude "is a crime which shows such depravity in the perpetrator . . . . . as creates a violent presumption against his truthfulness under oath," and " . . . . . the crimes of obtaining property by false pretense, larceny, forgery, and the issuance of worthless checks with intent to defraud, are among those which involve moral turpitude." Defendant's Requested Charge No. 93 (R-1428).

Numerous distinguished witnesses attested to Petitioner's good general reputation, good general reputation for incorruptibility in judicial office, and good general reputation for being a faithful and devoted husband (R-167-171; R-824-991; R-999-1001). There were no adverse character witnesses submitted by the prosecution.

In his oral charge to the jury before the jury retired to consider its verdict, the trial judge gave the following instructions to the jury at Petitioner's request:

> "DEFENDANT'S REQUESTED CHARGE NO. 39
>
> The Court charges the Jury that you cannot find the Defendant guilty of accepting a bribe unless you believe from the evidence beyond a reasonable doubt that a corrupt agreement or understanding existed between the Defendant and Myra Layton Braidfoot that the Defendant, as Judge of the Madison County Court, would give his act, opinion, decision, or judgment in a particular manner, or upon a particular side, of the criminal prosecution against Myra Layton Braidfoot which is named in Count One of the indictment." (R-1409-1410)

"DEFENDANT'S REQUESTED CHARGE NO. 40

The Court charges the Jury that the gravamen of the charge against the Defendant under Count One of the indictment is *not* that the Defendant accepted sexual favors or a promise of sexual favors from Myra Layton Braidfoot, or that his actions as Judge of the Madison County Court with respect to the criminal prosecution against Myra Layton Braidfoot which was then pending in said Court were influenced by such acceptance, but that the alleged acceptance of such sexual favors or promise of such sexual favors was under an agreement or understanding between the Defendant and Myra Layton Braidfoot that the Defendant's actions with respect to such criminal prosecution would be influenced by such acceptance, and unless you believe from the evidence beyond a reasonable doubt that such agreement or understanding existed, you cannot find the Defendant guilty of accepting a bribe under Count One of the indictment." (R-1410)

"DEFENDANT'S REQUESTED CHARGE NO. 41

The Court charges the Jury that you cannot find the Defendant guilty under Count One of the indictment unless you believe from the evidence beyond a reasonable doubt that the Defendant not only accepted sexual favors, or a sexual relationship, or a promise of sexual favors or sexual relationship, from Myra Braidfoot, and that the Defendant, because of such sexual favors or sexual relationship, or because of such promise of sexual favors or sexual relationship, dismissed or caused to be dismissed, nol-prossed, or caused to be nol-prossed, reduced or caused to be reduced, continued or caused to be continued, or otherwise disposed of or had disposed of, the criminal prosecution against Myra Layton Braidfoot which is named in Count One of the indictment, but that the Defendant also took such actions under an agreement or with an understanding with Myra Layton Braidfoot that he would take such actions with respect to such prosecution." (R-1411)

"DEFENDANT'S REQUESTED CHARGE NO. 62

The Court charges the Jury that you cannot find the Defendant guilty under Count One of the indictment of either corruptly accepting a bribe or corruptly agreeing to accept a bribe unless all of you believe from the evidence beyond a reasonable doubt that all material allegations of at least one of the crimes charged in the Count, in the disjunctive, are true." (R-1415)

"DEFENDANT'S REQUESTED CHARGE NO. 72

The Court charges the Jury that you cannot find the Defendant guilty under Count One of the indictment unless you believe from the evidence beyond a reasonable doubt that a corrupt agreement or understanding existed between the Defendant and Myra Layton Braidfoot." (R-1418)

"DEFENDANT'S REQUESTED CHARGE NO. 73

The Court instructs the Jury that if the Jury does not believe from the evidence beyond a reasonable doubt, after a consideration of all of the evidence, that the Defendant, in or near his office in the Madison County Courthouse, corruptly accepted from Myra Layton Braidfoot, or agreed with her to accept, one or more sexual favors, or a sexual relationship, from her, and that such sexual favors or relationship were of value to the Defendant, or that the Defendant corruptly accepted or agreed with Myra Layton Braidfoot to accept a promise from her of one or more sexual favors, or a sexual relationship from her, and that such promise by Myra Layton Braidfoot was of value to the Defendant, and that such acceptance or agreement to accept such sexual favors or relationship, or such promise of sexual favors or relationship, was under an agreement or with an understanding with Myra Layton Braidfoot that the Defendant, as Judge of the Madison County Court, would nol-pros or cause to be nol-prossed, or dismiss or cause to be dismissed, or reduce or cause to be reduced, or continue or cause to be con-

tinued, or to otherwise dispose of or have disposed of, the criminal prosecution of Myra Layton Braidfoot which is named in Count One of the indictment, you cannot find the Defendant guilty of accepting or agreeing to accept a bribe under Count One of the indictment." (R-1419)

The above-quoted instructions, defining the elements of the offense charged in the indictment, thus became the law of the case.

B.

CONSTITUTIONAL ISSUES RAISED BELOW

1. Before the Trial Court

Under Alabama criminal procedure, the question of the existence and sufficiency of evidence to support a conviction may be raised by three methods: (1) a motion made when the prosecution rests its case in chief to exclude the state's evidence; (2) written request to the trial court after both the state and defendant have rested their cases, but before the trial court gives its oral charge to the jury, for the affirmative charge in favor of the defendant, either with or without hypothesis; and (3) by timely motion for new trial after guilty verdict, judgment, and sentence. *Alexander v. State* (1967), 281 Ala. 457, 204 So. 2d 488; *Conner v. State*, 52 Ala. App. 82, 289 So. 2d 650, cert. den. 292 Ala. 716, 289 So. 2d 656; *Cassady v. State* (1973), 51 Ala. App. 544, 287 So. 2d 254. All of such methods were employed by Petitioner.

Directly after the State rested its case in chief, Petitioner moved the trial court as follows:

"MR. MANNING: Your Honor, before bringing in the jury, the Defendant will have a motion, in fact, four motions.

The Defendant, Your Honor, moves the Court to exclude the evidence of the State as to Count One of the Indictment, the Indictment as to which the Defendant here is being tried, that is, the case based on the testimony of the Braidfoot woman, with respect to that case. There is insufficient evidence to make a jury question, insufficient evidence to establish a prima facie case. There is certainly not substantial evidence in the case which would support a jury verdict of guilty in the absence of any evidence put on by the Defendant, under the State's own evidence and under reasonable inferences that could be drawn from that evidence. The State has failed to make a prima facie case out and there is insufficient evidence to put the Defendant to his defense. That motion is being made as to Count One of the Indictment. (R-609)

• • •

THE COURT: All right, sir. The Court feels that a jury question has been made out, that there is substantial evidence, and will therefore overrule the motion." (R-610)

The trial court denied Petitioner's motion to exclude the evidence and Petitioner excepted. (R-610)

Petitioner submitted the following timely written requests to the trial court for the affirmative charge in Petitioner's favor:

• • •

"DEFENDANT'S REQUESTED CHARGE NO. 95

The Court charges the Jury that they cannot find the Defendant guilty under the indictment." (R-1432)

"DEFENDANT'S REQUESTED CHARGE NO. 96

The Court charges the Jury that you cannot find the Defendant guilty under Count One of the indictment." (R-1432)

• • •

"DEFENDANT'S REQUESTED CHARGE NO. 100

The Court charges the Jury that if they believe the evidence in the case they cannot find the Defendant guilty under the indictment." (R-1433)

"DEFENDANT'S REQUESTED CHARGE NO. 101

The Court charges the Jury that if you believe the evidence in this case you cannot find the Defendant guilty under Count One of the indictment." (R-1433)

"DEFENDANT'S REQUESTED CHARGE NO. 102

The Court charges the Jury that you cannot find the Defendant guilty under Count One of the indictment of corruptly accepting a bribe." (R-1433)

"DEFENDANT'S REQUESTED CHARGE NO. 103

The Court charges the Jury that you cannot find the Defendant guilty under Count One of the indictment of corruptly agreeing to accept a bribe." (R-1434)

"DEFENDANT'S REQUESTED CHARGE NO. 104

The Court charges the Jury that you cannot find the Defendant guilty of accepting a bribe under Count One of the indictment." (R-1434)

"DEFENDANT'S REQUESTED CHARGE NO. 105

The Court charges the Jury that you cannot find the Defendant guilty of agreeing to accept a bribe under Count One of the indictment." (R-1434)

The above-quoted requested charges were refused by the trial court (R-1432-1434).

Petitioner filed a timely motion for new trial in the trial court after judgment of conviction and sentence were entered and pronounced. The motion, as amended, read, in part, as follows:

"Comes now the Defendant in the above-styled action and moves this Honorable Court to set aside the verdict of the jury in said action, and the judgment of the

Court entered thereon, and to vacate the sentence pronounced by the Court upon said verdict and judgment, and to grant unto the Defendant a new trial, and, as grounds for said motion, the Defendant sets down and assigns the following, separately and severally:

1. The verdict of the jury is not sustained by the great preponderance of the evidence.

2. The verdict of the jury is contrary to law.

3. The verdict of the jury is contrary to the law and the evidence in the case.

4. The verdict of the jury is not sustained by the great preponderance of the evidence, and it is contrary to both the law and the facts in the case.

5. The verdict of the jury is contrary to the law of the case.

6. The verdict of the jury is contrary to the facts in the case.

7. The verdict of the jury and the judgment entered thereon are contrary to the great weight and preponderance of the evidence in the case."

* * *

"9. The verdict of the jury was contrary to the weight of the evidence, and to the law controlling the issues in the case, in that, under all of the credible evidence in the case, and under the law applicable to the issues in the case, no reasonable man could exclude every reasonable and rational hypothesis except that of the Defendant's guilt of bribery, as charged in Count One of the indictment."

* * *

"14. The trial court erred in failing and refusing to give to the jury the Defendant's written requested general affirmative charge without hypothesis."

"15. The trial court erred in failing and refusing to give to the jury the Defendant's written requested general affirmative charge with hypothesis." (R-1502-1503)

The motion for new trial was overruled by order of the trial court reading in pertinent part as follows:

> "It is therefore ORDERED AND ADJUDGED by the Court that the Motion of the Defendant for a new trial as last amended is not well taken and that the same be and is denied and overruled.
>
> To which action and judgment on the part of the Court, the Defendant does in open court duly and legally reserve an exception thereto.
> Done this the 20th day of June, 1974.
>
> /s/ L. S. MOORE
> Special Judge" (R-1512)

Although *Thompson v. Louisville* (1960), 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654, is usually cited as the landmark case holding that it is a violation of the due process clause of Amendment XIV to the United States Constitution to convict and punish a person without evidence of his guilt, Alabama appellate courts so held at least as early as 1924. In *Frederick v. State,* (1924) 20 Ala. App. 336, 102 So. 146, cert. den. *Ex Parte State, Ex Rel. Attorney General,* 212 Ala. 158, 102 So. 147, a conviction was overturned for lack of evidence by the Court of Appeals of Alabama, and the Court, in its opinion, stated:

> "This Court has many times announced that the same rules of evidence and procedure obtained in prosecutions for violation of the laws enacted for the suppression of the evils of intemperance, as in all other criminal prosecutions, and until the state makes out its case by meeting the burden resting upon it, courts or juries have no right or authority to convict, for the fundamental law of the land is that in all criminal prosecutions the accused * * * shall not be deprived of life, liberty or property, except by due process of law."

In *Mauldin v. State* (1937), 28 Ala. App. 30, 177 So. 309, the Alabama Court of Appeals again held that a conviction without evidence to support all elements of the offense charged is a denial of due process of law. In *Mauldin,* the defendant was indicted and tried for the embezzlement of hogs. The Court found that there was no evidence tending to show any agency on the part of the defendant, or that he received the hogs described in the indictment as the agent of the owner. Such being the case, the court said that "we have the anomalous situation of a defendant being convicted of a crime charged against him without any evidence to sustain it," and "to permit this conviction to stand on the record as it appears before us would be to deny this defendant the right of due process of law, guaranteed to him by the Constitution of the United States (Amendment 14) and by the Constitution of this state (Section 6)."

In *Clemons v. City of Birmingham,* 277 Ala. 447, 171 So. 2d 456, the Alabama Supreme Court, although finding that in the particular case there was evidence of all elements of the offense charged, said in its opinion:

> "In dealing with the question thus presented, we are not concerned with the sufficiency of the evidence, but with the question as to whether Clemons' conviction rests upon any evidence at all, for it is a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States to convict and punish a person without any evidence of his guilt — *Thompson v. City of Louisville,* 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654; *Garner v. Louisiana,* 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207."

In *Clemons,* the Alabama Supreme Court tacitly recognized that if only one of the essential elements of the offense charged is not proven by some evidence, there will be a deprivation of due process of law.

The rulings of the trial judge in denying Petitioner's motion to exclude the State's evidence, the trial court's refusal of the Defendant's written requests for the general affirmative charge, and the denial by the trial court of the Petitioner's motion for new trial, could not, in view of the above-cited state authorities, as well as the federal authorities, have been made without a decision of the constitutional question as to whether or not there was legal and relevant evidence against the Petitioner of each and every constituent element of an offense charged in the indictment, for if there was no such evidence, Petitioner would be deprived of his right to due process of law under the Fourteenth Amendment if convicted, and he would have been entitled to a ruling granting his motion to exclude the State's evidence, his request for the general affirmative charge, and his motion for new trial.

2. Appeal to the Alabama Court of Criminal Appeals

Section 389 of Title 15, Code of Alabama 1940 (Recompiled 1958) provides:

> "In cases taken to the supreme court or court of appeals under the provisions of this chapter, no assignment of errors or joinder in errors is necessary; but the court must consider all questions apparent on the record or reserved by bill of exceptions, and must render such judgment as the law demands. But the judgment of conviction must not be reversed because of error in the record, when the court is satisfied that no injury resulted therefrom to the defendant."

The effect of the above-quoted statute is to make assignments of errors and briefs by a defendant in a criminal case unnecessary on appeal, and to require the Alabama appellate court, now the Court of Criminal Appeals, to itself search the record for all error injurious to the appellant in a criminal case. *Wallace v. State* (1973), 290 Ala. 201, 275 So. 2d 634; *Elliott v. State* (1968), 283 Ala. 67, 214 So. 2d 420; *Caton v. State* (1967), 281 Ala. 486, 205 So. 2d 239. Therefore, the existence and sufficiency of evidence to support a conviction is a question to which an Alabama appellate court must always address itself if the question is properly raised in the trial court, and provided there is a transcript of the evidence furnished the appellate court. *Wallace v. State, supra*; *Tool v. State*, 21 Ala. App. 233, 107 So. 36; *Atkins v. State*, 27 Ala. App. 212, 169 So. 330. In fact, the purpose of the above-quoted statute is "to affirmatively ascertain that due process of law prevails in every criminal case." *James v. State*, 28 Ala. App. 225, 181 So. 709; *Smith v. State*, 21 Ala. App. 70, 105 So. 397. In accord with the provisions of the above-quoted statute, and the usual appellate practice followed in Alabama in criminal cases, Petitioner made no assignments of error in the record on his appeal to the Alabama Court of Criminal Appeals in Petitioner's behalf, but, instead, filed briefs in support of his appeal. The question of the insufficiency and absence of evidence of the elements of the offense charged in the indictment were strongly argued by Petitioner in his briefs, and, in fact, Petitioner strenuously argued, with accompanying citations of state and federal authority, including decisions of this Court, that there was a total absence of evidence at Petitioner's trial of elements of the offense charged, and that his conviction and sentence were in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and imposed involuntary servitude in violation of the Thirteenth Amendment to the Constitution.[7] The Alabama Court of

[7]See Appendix, *infra*, 37a-39a, 40a-55a, for excerpts from Petitioner's brief filed with the Alabama Court of Criminal Appeals, including "Propositions of Law," with accompanying citations, and Argument specifically directed to the federal constitutional issue raised by this Petition for Certiorari.

Criminal Appeals, in its opinion, discussed the evidence against Petitioner in some detail, and addressed the question of whether there was evidence to support Petitioner's conviction. Appendix, *infra*, 8a-10a, 12a-23a. It did not, however, expressly mention that a federal constitutional issue was involved.

Petitioner's motion for rehearing of the decision and opinion of the Court of Criminal Appeals was supported by brief in which he again directly pointed to the fact that there was no evidence to support constituent elements of the offense charged, and to the fact that Petitioner had been convicted and sentenced to imprisonment in violation of the Fourteenth and Thirteenth Amendments by reason thereof.[8]

3. Petition for Certiorari in the Supreme Court of Alabama

The insufficiency — and absence — of evidence to support constituent elements of the offense as charged in the indictment against Petitioner were the bases of seven Assignments of Error in Petitioner's application to the Supreme Court of Alabama for writ of certiorari to review the judgment and opinion of the Alabama Court of Criminal Appeals affirming Petitioner's conviction.[9] In three of such Assignments of Error (IV, XIV, XV), Petitioner expressly and directly contended that, because of no evidence of the elements of the offense charged, his conviction and sentence were in violation of the Fourteenth and Thirteenth Amendments. Appendix, *infra*, at 29a-34a.

[8]See Appendix, *infra*, 56a-66a, for excerpts from Argument and "Propositions of Law in Petitioner's brief filed on motion for rehearing of decision and opinion of the Alabama Court of Criminal Appeals.

[9]Assignments of Error I, II, III, IV,XI, XIV, XV of Petition to Alabama Supreme Court for Writ of Certiorari to Alabama Court of Criminal Appeals.

In his brief filed in the Alabama Supreme Court in support of his Petition for Writ of Certiorari, Petitioner strongly argued the issue of sufficiency — and absence — of evidence to support the elements of the crime charged, and expressly addressed the question of whether he had been convicted and sentenced in violation of the Thirteenth and Fourteenth Amendments because of no evidence to support a jury verdict that such elements existed as fact.[10]

REASONS FOR GRANTING THE WRIT

I.

Petitioner has been convicted of a crime and sentenced to imprisonment in the State Penitentiary of Alabama for a term of three years as punishment therefor by the Circuit Court of Madison County, Alabama. Petitioner was convicted without evidence of his guilt of the crime for which he was convicted, and he is thereby about to be deprived of his liberty by the State of Alabama without due process of law, in violation of Amendment XIV to the Constitution of the United States, and the judgment of the Court of Criminal Appeals of Alabama, affirming the judgment of conviction and sentence, is therefore contrary to applicable decisions of the Supreme Court of the United States.

This Petition involves no novel question of federal statutory or constitutional law. It involves only a matter of enforcement of the natural and transcendent right of every man, and the constitutional right of a citizen of the United States, to freedom from imprisonment by the State, except

[10]See Appendix, *infra*, 68a-72a; 74a-90a, for excerpts from Petitioner's brief filed with the Alabama Supreme Court in support of his Petition for Writ of Certiorari which are directed to the federal constitutional issue raised by this Petition.

as punishment for a crime of which he has been duly convicted, after a trial characterized by that fundamental fairness, which is "due process of law."

The constitutional right of an accused to confront and to cross-examine the witnesses against him, his right to a public trial, his right to decline to be a witness against himself, his right to have evidence of guilt excluded from consideration if it was obtained by unreasonable search and seizure, pale into insignificance in comparison with his right to be free from imprisonment, and from the stigma and civil disabilities of a felony conviction, unless there is relevant evidence which authorizes a reasonable inference of his guilt. It is a far greater perversion of public justice that the State imprison a citizen without evidence of his guilt than that it imprison him after Star Chamber proceedings, but upon evidence authorizing a jury finding that he is guilty beyond a reasonable doubt. Petitioner has been convicted without evidence of his guilt. Having exhausted all remedies afforded him by his native State, he must now turn to the highest court in this land for relief.

In *Thompson v. City of Louisville* (1960), 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654, a unanimous Supreme Court of the United States pronounced the rule that "just as a conviction upon a charge not made would be sheer denial of due process," so is it "a violation of due process to convict and punish a man without evidence of his guilt," and the Court held that a conviction so obtained in a State court is a violation of the Fourteenth Amendment to the Constitution of the United States.

In *Thompson, supra,* this Court found that all three constituent elements of the crime of which defendant was convicted (loitering) were totally unsupported by evidence. Since *Thompson* was decided, this Court has been presented with additional cases in which no element of the crime

charged was supported by the evidence, and it has held that a conviction under such circumstances is a denial of due process of law. *Garner v. Louisiana* (1961), 368 U. S. 157, 7 L. Ed. 2d 207, 82 S. Ct. 248; *Barr v. Columba* (1964), 378 U. S. 146, 12 L. Ed. 2d 766, 84 S. Ct. 1734; *Gregory v. Chicago* (1969), 394 U. S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946.

It is, of course, axiomatic that every crime consists of its constituent elements, and, if only one of its constituent elements does not exist, there is no crime; therefore, if there is no evidence of one or more of the constituent elements of the crime, there is no evidence of the crime. Accordingly, this Court has held both expressly and impliedly that there was "no evidence" of the crime charged in cases where there was, in fact, evidence of certain constituent elements of the crime charged, but not evidence of others. *Shuttlesworth v. Birmingham* (1965), 382 U. S. 87, 15 L. Ed. 2d 176, 86 S. Ct. 211; *Taylor v. Louisiana* (1962), 370 U. S. 154, 8 L. Ed. 2d 395, 82 S. Ct. 1188, reh. den. 370 U. S. 965, 8 L. Ed. 2d 834, 82 S. Ct. 1578; *Brown v. Louisiana* (1966), 383 U. S. 131, 15 L. Ed. 2d 637, 86 S. Ct. 719; *Johnson v. Florida* (1968), 391 U. S. 596, 20 L. Ed. 2d 838, 88 S. Ct. 1713; *Vachon v. New Hampshire* (1974), 414 U. S. 478, 38 L. Ed. 2d 666, 94 S. Ct. 664; *Harris v. U. S.*, 404 U. S. 1232, 1233, 30 L. Ed. 2d 25, 92 S. Ct. 10.

The indictment against Petitioner (*infra*, p. 5) tracks the statute defining the offense, viz: Code of Alabama 1940 (Recompiled 1958), Title 14, § 64 (hereinafter referred to as the "bribery statute"). The indictment itself sets forth the constituent elements of the offense charged, and specifies the mode in which Petitioner was claimed by the State to have committed the offense.

The Alabama Court of Criminal Appeals, construing the indictment, said in its opinion that the "gift, gratuity, or

other thing of value," alleged to be the "bribe" which Petitioner allegedly accepted or agreed to accept from the prosecuting witness, Myra Braidfoot, was:

> ". . . . . sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship . . . . . ." Appendix, *infra*, at 11a.

Therefore, the elements of the offense charged in the indictment were that the Petitioner, while Judge of the Madison County Court, and acting in his official capacity:

1. Corruptly *accepted* from Myra Braidfoot, or *agreed with her* to accept, "sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship"

which was

2. *Under an agreement* or understanding with her that Petitioner, in his official capacity as Judge, and in consideration of what Myra Braidfoot was to give him, would "dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, reduce or cause to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial . . . . . ." the larceny case then pending against Myra Braidfoot in the Madison County Court.

The entire content of the portion of the opinion of the Alabama Court of Criminal Appeals addressed to the sufficiency of the evidence to authorize a "fair inference" of the existence of both of the above listed constituent elements of the crime charged in the indictment is set out below:

> "It is strongly insisted by appellant that the evidence was insufficient to authorize a conviction.
>
> To constitute an offer to accept a bribe, the thing solicited must be valuable and may be some act. *Caruthers v. State*, supra.

> The Alabama statute condemns an offer to accept a bribe by promise of a "thing of value", and a conviction may be had on proof that an offer to accep by an accused was made in exchange for his official partiality in matters pending before him.
>
> Although the evidence before the jury was in dispute, it could be inferred from this statement in Braidfoot's testimony, "if I met him at Kings Inn we could talk about the situation and maybe take care of it," appellant was asking for a "thing of value" or an "act beneficial to" himself.
>
> The word "value" is not limited to desirable things generally received in bribery cases. The test of value is the desire of a person for the thing in question. *Scott v. State*, supra.
>
> Authorities have shown that relevant, similar transactions as those committed by appellant are admissible. *Fall v. U. S.*, supra; *White v. State*, supra; *Scott v. State*, supra; and *Roden v. State*, supra.
>
> Appellant argues the "pattern" evidence was inadmissible as nothing of value was solicited of Braidfoot or the others. A similarity between the Braidfoot matter and the pattern testimony is apparent. It could reasonably be inferred that appellant's intent, motive, design and scheme in all of the transactions were the same and it was his intent to exchange his high judicial functions for what he personally desired.
>
> Where there is legal evidence, as in this case, from which the jury can by fair inference find the accused guilty, this court has no right to disturb the verdict. *Haggler v. State*, 49 Ala. App. 259, 270 So. 2d 690." Appendix at 25a-26a, *infra*.

A careful reading of the above quoted portion of the opinion of the Court of Criminal Appeals conclusively demonstrates that the Court of Criminal Appeals based its affirmance of Petitioner's conviction upon one sentence from Myra Braidfoot's testimony, viz.:

". . . . . If I met him at the Kings Inn we could talk about the situation and maybe take care of it." Appendix, at 25a, *infra.*

For there to have been *any* evidence to support Petitioner's conviction, it is, therefore, necessary to find that to be true which is patently untrue — that from the above-quoted statement from the testimony of an ex-convict, testifying more than two years after the event, an inference may be drawn that Petitioner accepted from Myra Braidfoot, or agreed with her to accept, "sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship;" and that such sexual intercourse, or promise of sexual intercourse, or of "other favors or relationship," was with an "agreement or understanding" between Petitioner and Myra Braidfoot that Petitioner, in his official capacity, would "dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, reduce or cause to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of," the larceny case then pending against Myra Braidfoot in the Madison County Court. The necessary inferences of the existence of such elements of the crime charged would also, necessarily, have to be drawn despite the fact that Myra Braidfoot herself testified that Petitioner did not request sexual intercourse with her, and she did not propose sexual intercourse to Petitioner (R-210); and Petitioner did not promise her any favors with regard to her pending larceny prosecution (R-210-211). Thus, Myra Braidfoot's testimony, considered as a whole, not only failed to establish facts from which, if true, one could reasonably deduce the truth of the ultimate facts alleged in the indictment, but her testimony expressly negated such ultimate facts. An inference, of course, is, by definition, merely a deduction from proven *facts.* Since an inference is itself a deduction from facts, inference may not

be based on another inference. *Woodward Iron Company v. Goolsby,* 242 Ala. 329, 6 So. 2d 11. To base an inference on another inference would be to base a deduction upon another deduction. As stated by the Alabama Supreme Court in *Brickley v. State* (1970), 286 Ala. 546, 243 So. 2d 502, an inference "must have a palpable beginning," meaning that there must be proof of *facts* from which the inference (deduction) naturally flows. Here, a deduction of a bribery agreement from testimony negating a bribery agreement is similar to deducing that it rained on a certain day from proof that the sky was clear all day!

The Alabama Court of Criminal Appeals did not, in its opinion, comment on the sufficiency of the evidence (or as to whether it found any evidence at all) that Petitioner accepted sexual intercourse, or a promise of sexual intercourse, or a promise of "other sexual favors or relationship" from Myra Braidfoot, under an *agreement* or *understanding* with her that he would give her the specific judicial favors alleged in the indictment. Instead, the Court of Criminal Appeals said:

> "The Alabama statute condemns an *offer* to accept a bribe by promise of a 'thing of value', and a conviction may be had on proof that an *offer* to accept by an accused was made in exchange for his official partiality in matters pending before him."

The "bribe" alleged in the indictment, as the Court of Criminal Appeals said in its opinion, was "sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship." Appendix, at 11a, *infra.* Myra Braidfoot did not only fail to testify that Petitioner solicited "sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship" from her, but she herself said that he did not do so (R-210), and she said that she did not offer Petitioner

sexual intercourse (R-210). Myra Braidfoot herself said that Petitioner did not offer her any official favors, and she did not offer to have sexual intercourse with him if he would give her official favors (R-211). She said that he merely offered to talk about "the situation and *maybe* take care of it." Appendix, *infra*, at 25a. There was no evidence that Myra Braidfoot received any official favors from Petitioner. Defendant's Exhibit 1, (R-200, 1462). Therefore, assuming that the Alabama bribery statute condemns a mere "offer to accept a bribe," there was not only a complete absence of affirmative evidence of such an offer, but the prosecuting witness herself testified to the contrary.

The bribery statute under which Petitioner was indicted, tried, convicted, and sentenced, does not, however, by its express terms, make a crime of a mere offer or solicitation of a bribe. The statute requires an "*agreement*" or "*understanding*" between the taker and the giver of the bribe. One cannot have an "agreement" with himself, or an "understanding" with himself. Under the statute, a corrupt bilateral agreement, i.e., a contract, is required, and, under the statute, as well as under the indictment, Petitioner could not be guilty unless Myra Braidfoot gave or promised a "thing of value" to Petitioner under a bilateral agreement with Petitioner that, in consideration of the *specific* "thing of value," *alleged in the indictment*, he, in his official capacity, would noi-pros, dismiss, etc., the grand larceny case then pending against Myra Braidfoot in the Madison County Court. *U. S. v. Dietrich*, 126 F. 664; *Barefield v. State*, 14 Ala. 603; *People v. Weitzel* (Cal.), 255 Pac. 792, 52 A.L.R. 811; *People v. Coffey*, 161 Cal. 433, 119 Pac. 901, 39 L.R.A. (N.S.) 704; *State v. Bowles*, 70 Kan. 821, 79 Pac. 726, 69 L.R.A. 176. In fact, a solicitation of a bribe, or an offer to accept a bribe, is a separate and distinct crime, under a separate and distinct statute in Alabama, than that

under which the indictment against Petitioner was drawn, and a different punishment is prescribed.[11] Be that as it may, however, the indictment against Petitioner clearly charges a *bilateral agreement* under which Myra Braidfoot did, or promised to do, certain *specific* things for Petitioner, in exchange for which Petitioner agreed with her to do certain *specific* things. The case was tried on such theory; the case went to the jury under such theory under instructions from the trial court in accord therewith; and the jury convicted under such theory.[12] The jury must be presumed to have followed the instructions of the trial court regarding the elements of the offense charged and the other matters to be proved by the State. Therefore, Petitioner was not, insofar as the jury was concerned, charged with merely making a unilateral offer to Myra Braidfoot to accept a bribe, and he was not found guilty of such a charge. If the Court of Criminal Appeals affirmed Petitioner's conviction upon the theory that he was tried and convicted for mere solicitation of a bribe, and not for entering into a bilateral bribery agreement with Myra Braidfoot, the Court of Criminal Appeals did not affirm the conviction on the basis of a trial Petitioner might have been given, but was not. In a similar case, this Court, in a unanimous opinion written by Mr. Justice Black, held that a defendant had been deprived of due process of law where he had been indicted on one theory of criminal liability, and tried upon that theory, but the state appellate court had affirmed the conviction because, in its opinion, the evidence was sufficient to support a guilty verdict under another section of the statute than

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[11]Code of Alabama 1940 (Recompiled 1958), Title 14, §75. Appendix at 92a, *infra*.

[12]See Petitioner's written requested charges numbered 39, 40, 41, 62, 72 and 73, copied verbatim on pp. 11-14 of this Petition, given to the jury by the trial court before it retired to consider its verdict. (R-1409-1411, 1415, 1418-1419)

that under which the defendant had been indicted, tried, and convicted. *Cole v. Arkansas* (1948), 333 U. S. 196, 92 L. Ed. 644, 68 S. Ct. 514. In *Cole*, this Court said:

> "Without completely ignoring the judge's charge, the jury could not have convicted petitioners for having committed the separate, distinct, and substantially different offense defined in § 1. Yet the State Supreme Court refused to consider the validity of the convictions under § 2, for violation of which petitioners were tried and convicted. It affirmed their convictions as though they had been tried for violating § 1, an offense for which they were neither tried nor convicted. No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. * * * If, as the State Supreme Court held, petitioners were charged with the violation of § 1, it is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. *It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.* * * *"
>
> * * *
>
> *To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.*"

The Court of Criminal Appeals dwelled in its opinion on the evidence of so-called "similar transactions" with other women as evidence of Petitioner's corrupt intent, and as evidence of "motive, design and scheme." In no instance involving the "other" women was the completed offense

under the bribery statute proved, even prima facie, but, assuming the relevance of such testimony, it would have no probative force to prove that Petitioner did the specific acts stated in the indictment as constituting the offense. In other words, the most that can possibly be said for the probative force of such testimony was that it tended to prove that Petitioner had been guilty of sexual misconduct, or of conduct with sexual connotations, with certain women who had had business with his court, and that he may have been inclined to bestow official favors upon women in exchange for sex. Assuming such to be the case, such testimony would be some evidence, however slight, that Petitioner *intended* to make an illegal bribery agreement with Myra Braidfoot if she should be receptive to it, but mere *intention* to commit a criminal act, standing alone, is never a crime. The criminal law punishes for criminal acts, not merely evil thoughts, intentions, or states of mind. This was pointed out by Mr. Justice Bookout of the Alabama Court of Criminal Appeals, who, in his dissenting opinion on Petitioner's application for rehearing in that Court, said:

> ". . . . . intent alone is insufficient to support the positive averments spelled out in the indictment. The above conversation lacked specificity of action by the appellant as charged in the indictment. *On reviewing the evidence, I am unable to find an actual promise or agreement that appellant would dismiss or nol-pros Mrs. Braidfoot's case in exchange for her favors.* He suggested meeting and talking, and although we may believe from his pattern of conduct that he would make an illegal proposition, nevertheless, we do not know for he never got to that point." Appendix, at 28a, *infra*.

There having been no evidence that Petitioner corruptly accepted from Myra Braidfoot, or agreed with her to accept,

a "thing of value" which was specified in the indictment, as a consideration moving to Petitioner from Myra Braidfoot, *under an understanding with her that he, as Judge, would give her larceny case the specific favorable treatment alleged in the indictment*, Petitioner was convicted, and his conviction affirmed on appeal to the Alabama Court of Criminal Appeals, without due process of law, and he is due to be discharged from further prosecution under the indictment under the authority of *Thompson v. City of Louisville, supra*, and its progeny.[13]

II.

Petitioner's conviction of accepting a bribe is supported by no evidence of the constituent elements of the crime charged, and his conviction and sentence to imprisonment in the State Penitentiary for a term of three years as punishment for the alleged crime will impose involuntary servitude, in violation of the rights conferred upon Petitioner by the Thirteenth Amendment to the Constitution of the United States.

The Thirteenth Amendment provides that "neither slavery nor *involuntary servitude*, except as a punishment for crime whereof the party shall have been *duly* convicted, shall exist within the United States . . . . . ." The United States Court of Appeals for the Second Circuit held, prior to *Thompson v. Louisville, supra*, that to jail a man without evidence of guilt is to impose involuntary servitude in violation of the Thirteenth Amendment. *Caminito v. Murphy* (1955, CA 2 N.Y.), 222 F. 2d 698, cert. den. 350 U. S. 896, 100 L. Ed. 788, 76 S. Ct. 155. The same argument hereinbefore addressed to the due process of law ques-

[13]See, especially, *Vachon v. New Hampshire* (1974), 414 U.S. 478, 38 L. Ed. 2d 666, 94 S. Ct. 664; *Johnson v. Florida* (1968), 391 U.S. 596, 20 L. Ed. 2d 838, 88 S. Ct. 1713.

tion in this case under the Fourteenth Amendment is applicable here, and is incorporated by reference. The question of Petitioner's conviction and sentence to imprisonment without evidence, as constituting a violation of the Thirteenth Amendment, was raised in the state courts below. To the best of counsel's knowledge, this Court has not heretofore determined whether or not a conviction of a person without relevant evidence with probative force to support the charge, and a sentence to imprisonment thereon, is a violation of the Thirteenth Amendment. Such is a substantial federal question which should be determined by this Court.

III.

CONCLUSION

For the reasons above stated, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

JUDGMENT OF CONVICTION AND SENTENCE

STATE OF ALABAMA — IN THE CIRCUIT COURT
MADISON COUNTY — CASE NO. 73-367F
STATE OF ALABAMA — PLAINTIFF

VS.

THOMAS D. McDONALD — DEFENDANT

This day, February 25, 1974, in open Court came the State of Alabama by its Attorney General and the Defendant in his own proper person and with his counsel and this cause coming on to be heard on the 25th day of February, 1974 and the defendant having been theretofore duly and legally arraigned upon the indictment in this cause and having entered a plea of not guilty thereto and issue being joined. Thereupon a jury of good and lawful jurors were empanelled and duly sworn in accordance with the law to try said case and cause and trial was begun on said date with the issue joined by the indictment on the one hand and the defendant's plea of not guilty on the other hand. The trial for said cause having continued from day to day until this the 7th day of March, 1974. The defendant and his counsel being present in open court during trial of said cause and all proceedings connected therewith at all times.

Now on this the 7th day of March, 1974 came said jury of good and lawful jurors to-wit: Barry D. Allan and eleven others, who having been duly empanelled and sworn according to law on and upon their oath do say:

> "We, the Jury, find the Defendant, Thomas D. McDonald, guilty as charged in Count One of the indictment.
>
> Barry D. Allan
> Foreman"

Thereupon the defendant being present in open Court and attended by his counsel was asked by the Court if he had anything to say why the sentence of the law and the judgment of the Court should not be pronounced upon him, and he said nothing.

Thereupon the Defendant being present in open Court and attended by his counsel and the Court having considered the same, it is ORDERED AND ADJUDGED by the Court that the Defendant is guilty, in accordance with the verdict of the jury, of accepting a bribe as charged in Count One of the indictment, and that as punishment for the said offense the defendant be and is sentenced to imprisonment in the penitentiary of Alabama for three (3) years.

The defendant and his counsel have been present in open Court at all times and at all stages of this trial and proceedings thereon.

Done this the 7th day of March, 1974.

/s/ L. S. MOORE
L. S. Moore
Special Judge

DOCKET ENTRIES OF COURT OF CRIMINAL APPEALS OF ALABAMA RELATIVE TO PETITIONER'S APPEAL

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

8 Div. 524

Thomas D. McDonald
v.
State
Appeal from Madison Circuit Court
Number 73-367F

MARCH 11, 1974	Certificate of Appeal Filed.
OCTOBER 22, 1974	Transcript Filed (8 Volumes with Supplement) .
FEBRUARY 5, 1975	Come the parties by attorneys and argue and submit this cause for decision.
MAY 27, 1975	Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court; it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circit Court be in all things affirmed. It is also considered that the Appellant pay the costs of appeal of this Court and of the Circuit Court.

MAY 27, 1975	Certificate and Opinion issued.
JUNE 10, 1975	Comes now Thomas D. McDonald, the Appellant in the above-styled cause, and moves this Honorable Court to grant him a rehearing in said cause, and to reverse, revise, and hold for naught its judgment rendered on, to-wit: May 27, 1975, affirming the judgment of the Circuit Court of Madison County, Alabama, and to enter an order reversing the judgment of said Circuit Court and rendering said cause.
	/s/ GLENN F. MANNING *Attorney for Appellant*
JUNE 10, 1975	Certificate of Judgment and Opinion Recalled.
JUNE 12, 1975	Motion to Extend Opinion.
JUNE 13, 1975	Certificate of Judgment and Opinion Received.
JUNE 30, 1975	It is ordered that the application for rehearing be and the same is overruled. Opinion Extended.
JUNE 30, 1975	Certificate and Opinion Issued.
APRIL 21, 1976	Stay of Judgment Granted for a Period of Ninety (90) Days From April 9, 1976, to Allow Filing of Petition for Certiorari in the Supreme Court of the United States.

I, Mollie Jordan, Clerk of the Court of Criminal Appeals, do hereby certify that the foregoing entries are full, true and correct copies of the docket entries, the judgment and

the orders of the Court of Criminal Appeals in the above-styled cause as the same appear and remain of record and on file in this office.

WITNESS, Mollie Jordan,
Clerk of the Court of
Criminal Appeals of
Alabama, this 29th day of
April, 1976.

/s/ MOLLIE JORDAN
Clerk, Court of Criminal
Appeals of Alabama

SEAL

MAY 27, 1975

OPINION OF COURT OF CRIMINAL APPEALS OF ALABAMA

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1974-75

8 Div. 524

Thomas D. McDonald
v.
State
Appeal from Madison Circuit Court

DeCARLO, JUDGE

Thomas D. McDonald was convicted of bribery and sentenced to three years. All of the judges of the 23rd Judicial Circuit recused themselves. The Chief Justice, Howell T. Heflin, assigned the Hon. L. S. Moore, Supernumerary Circuit Judge, to preside over this case.

Before trial, appellant filed a plea in abatement based upon fraud and other irregularities in making up the jury box from which the grand jury returning the indictment was drawn. Appellant also filed a written waiver of his right to jury trial on the grounds of extensive pre-trial publicity, but did not file a motion for change of venue. Both the plea in abatement and the motion to waive a trial by jury were properly overruled by the court. *Shields v. State*, 52 Ala. App. 690, 296 So. 2d 786.

On appeal, appellant also challenges the court's action in hearing the evidence on the plea in abatement without a jury. The record does not reflect an objection by defense counsel and failure to submit this matter to a jury was not

prejudicial to appellant. *Racine v. State*, 291 Ala. 684, 286 So. 2d 896.

Appellant was charged by a four-count indictment with violations of T. 14, § 64, Code of Alabama 1940, Recompiled 1958, in accepting a bribe or agreeing to accept a bribe. A plea in abatement and demurrer thereto were overruled.

After an election by the State, the case was submitted to the jury on count one which reads:

> "Thomas D. McDonald, alias Tom McDonald, a judicial officer, to-wit: Judge of the Madison County Court, Huntsville, Madison County, Alabama, did in, to-wit: December, 1971, in or near the office of the said Thomas D. McDonald, alias Tom McDonald, in the Courthouse of Huntsville, Madison County, Alabama, unlawfully and corruptly accept or agree to accept a gift, gratuity, or other thing of value, or a promise to do an act beneficial to the said Thomas D. McDonald, alias Tom McDonald, to-wit: Sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship from one Myra Layton Braidfoot, alias Myra Braidfoot Layton, a woman, under an agreement or with an understanding that his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, question, or proceeding, which by law was pending before him in his official capacity, to-wit: The cause, question or proceeding being a criminal prosecution of said Myra Layton Braidfoot, alias Myra Braidfoot Layton, wherein the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, was charged with Grand Larceny under the laws of the State of Alabama, and said criminal prosecution being otherwise identified as the State of Alabama vs. Paul Duane Braidfoot, Myra Layton Braidfoot, Defendants, Case No. 97467, Madison County Court, Huntsville, Madison County, Alabama, and that the said Thomas D.

McDonald, alias Tom McDonald, as Judge of the Madison County Court, Huntsville, Madison County, Alabama, would dismiss or cause to be dismissed, no-pros or cause to be nol-prossed, reduce or cause to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial to the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, all against the peace and dignity of the State of Alabama."

This count is based on T. 14, § 64, Code of Alabama, which provides:

"Any legislative, executive or judicial officer or any municipal officer, or any deputy officer, or any clerk, agent or employee of any such legislative, executive, judicial or municipal officer who corruptly accepts or agrees to accept any gift, gratuity, or other thing of value, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his act, vote, opinion, decision or judgment is to be given in any particular manner, or upon any particular side of any cause, question, or proceeding, which is pending or may be by law brought before him in his official capacity: Or that he is to make any particular appointment in his official capacity, shall, on conviction, be imprisoned in the penitentiary for not less than two years or more than ten years."

At trial Myra Layton Braidfoot testified she had been arrested in Madison County on a charge of "conspiracy of larceny." Between November and December, 1971, she appeared in Judge Thomas D. McDonald's court three times, and on each occasion, she saw appellant in his chambers.

The first time, she was told by the bailiff that the judge wanted to see her. While in the judge's chambers, she sat on a couch and appellant sat in a chair behind his desk. Although she couldn't remember the extent of their conversation, she did recall the judge commented about how attractive she was.

When she was called into the judge's chambers the second time, he again remarked how attractive she was. She did not recall anything else about their conversation.

Her testimony as to the third occasion was:

"Q. What happened the third time, please ma'am?
"A. Well, we were in his Chambers again, and as we were getting up to leave he asked me if I could meet him at Kings Inn at 10:00.
"THE COURT: Asked you what?
"A. If I could meet him at Kings Inn at 10:00.
"Q. The Defendant asked her if she could meet him at the Kings Inn at 10:00.
"THE COURT: All right. I'm just a little hard of hearing.
"Q. Did he touch you or anything that time, squeeze you?
"A. He put his arm around my waist.
"Q. This Defendant, Thomas McDonald?
"A. Yes, sir.
"Q. And were you alone in his office?
"A. Yes, sir.
"Q. And what again did he say now, other than meeting him at the Kings Inn?
"A. He said if I met him at Kings Inn we could talk about the situation and maybe take care of it.
"Q. Of the case?
"A. Yes, sir.
"Q. All right. If you met him at Kings Inn at 10:00, what did you tell him?
"A. I told him that I would."

Only she and appellant were present on each of the three visits, and during this period of time, her case was being continued. Following the last visit, she reported the incident to her lawyer in Decatur, and the case was later transferred to another court.

Judge Thomas D. McDonald, Judge of the General Sessions Court of Madison County, since January 1, 1974, and prior to this time, Judge of the Madison County Court, testified in his own behalf. He recalled that on December 9th or 16th of 1971, about 9:30 A.M., he sent either his bailiff or clerk to summons Myra Braidfoot to his chambers. She was alone, and either he or the bailiff closed the door. He sat at his desk and she sat on the sofa or a chair. He informed Myra Braidfoot her attorney would be late. They discussed her charges, but he did not recall telling her she was attractive. He denied asking her to meet him at the Kings Inn, but stated he may have taken her arm and escorted her to the door.

He stated the morning docket had not been completed. Ordinarily court was recessed after the first call until 10:00 A.M., and sometimes preliminary hearings would continue into the afternoon.

I

Appellant's demurrer to the indictment contained 84 grounds, and he insists the judge erred in overruling it. In its brief, the State grouped these grounds under four general arguments, and the court's action will be evaluated in this context.

1. The indictment does not apprise the accused with reasonable certainty of the act or acts with which he is charged.

No code form exists in Alabama, for the offense denounced in T. 14, § 64, supra. The indictment charged the offense in the words of the statute, *Harris v. State*, 32 Ala. App. 519, 27 So. 2d 794, and it sufficiently recited the essential elements of the offense of bribery. The requisite general description of the offense was apparent. *Caruthers v. State*, 74 Ala. 406.

Identification of the accusation was sufficient to enable the accused to prepare his defense and permit the court to pronounce a proper judgment on conviction. *Fitzgerald v. State*, 53 Ala. App. 663, 303 So. 2d 162.

2. The indictment charges "two separate offenses" in the alternative.

Alternative joinder of offenses is expressly provided for in T. 15, § 249, Code of Alabama.

Where a statute specifies several ways in which an offense may be committed, they may be charged in one indictment or count using conjunctions to connect them. *Arellanes v. U. S.*, 302 F. 2d 603.

3. It does not specify the nature of the "gift, gratuity, or other thing of value" accepted by appellant.

The gift, gratuity, or other thing of value averred in the indictment was ". . . Sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship from one Myra Layton Braidfoot . . ."

12 Am Jur 2d Bribery § 7, states this test for determining value:

> "It seems that a bribe must involve something of value that is used to influence action or non-action. Value, though, is determined by the application of a subjective, rather than an objective, test, and the requirement of value is satisfied if the thing has sufficient value in the mind of the person concerned so that his actions are influenced."

In *Caruthers v. State*, supra, Judge Somerville wrote:

> "The word 'thing' does not necessarily mean a substance . . . . [I]t includes an act, or action."

The Ohio court recognized in *Scott v. State*, 141 N.E. 19, that it is impossible to establish value which is universal. Further, the court stated: "The test of the value must

necessarily be the desire of some person or persons, not necessarily of most persons or all persons, for the thing in question." In conclusion, the court held that sexual favors solicited in exchange for official action was a sufficient thing of value.

4. The indictment did not specify the official duties of the accused sought to be corruptly influenced.

The official duties were generally stated in this manner:

> ". . . [T]hat his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, question, or proceeding, which by law was pending before him in his official capacity . . ."

and more specifically:

> ". . . [W]ould dismiss or cause to be dismissed, nol-pros or cause to be no-prossed, reduce or cause to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial to the said Myra Layton Braidfoot . . ."

The law does not protect a corrupt judge because he exceeds his powers, and his actions are "colorable" only. *People v. Jackson*, 191 N.Y. 293, 84 N.F. 65; *Wells v. State*, 129 S.W. 2d 203; *Whitney v. U. S.*, 99 F. 2d 327.

The gravamen of the offense is the acceptance and solicitation of the bribe to influence his official conduct. *Sharp v. U. S.*, 138 F. 878.

II

To sustain its burden of proof, the State offered evidence of similar transactions to show intent, motive, design and scheme. This evidence involved four other females having matters coming before appellant's court and the attending facts relative to their transactions with appellant.

Appellant insists the trial court erred in allowing this evidence and urgently contends that the testimony of Cheryn Forsythe, Brenda Gwathney, Laura Blann, and one other whose anonymity was preserved, was palpably erroneous and prejudicial.

The facts as related by Cheryn Forsythe were:

In March, 1971, she came before Judge McDonald on a charge of issuing a worthless check to Tourway Inn. After a demand for preliminary hearing, the charge was amended on motion of the District Attorney, and she pleaded guilty. Upon payment of the fine and costs, the sentence was suspended for restitution. After restitution, the jail sentence was remitted.

On April 1, 1971, she was arrested on a fugitive warrant growing out of a probation violation in the State of Ohio. This case was continued from time to time on her own motion and prosecution was dismissed on May 27, 1971.

At the time she was arrested on the Tourway Inn check, Billy Eades, a city policeman, accompanied her to Judge McDonald's office. The officer asked the judge to help her because she was working with the police. At that time, the Tourway Inn check and the Ohio flight warrant cases were pending against her. After Officer Eades talked to Judge McDonald, she remained out of jail and continued to help the police.

In October, 1971, she as before appellant's court for issuing a worthless check to Southern Airlines. On advice of the bailiff, she went to the judge's chambers to discuss the case. The judge advised her to get a lawyer, and the warrant, being defective, was dismissed. Subsequently, she was re-arrested on a new warrant and went to see appellant in his chambers. Her testimony was:

> "A. He asked me if I could meet him in his Chambers — I mean meet him. I asked why, he said

he wanted to talk to me and that he could get it taken care of.

"Q. Get the case taken care of?

"A. Yes."

Either that day or the next, she met appellant at the parking lot of the Big Gun Store and followed him in her car to George Fann Realty. It was just after dark when they arrived and both went into the office. After talking for awhile, the judge mixed himself a few drinks but the witness did not have any. She testified that after having sexual intercourse with the judge on the couch, he told her to bring the money by in a few days to pay the check. Eventually she took the money to him and never went back to court on that case.

In October, 1972, she was arrested on nine worthless check cases and after going to the sheriff's office, three additional warrants were placed against her. Again, she went to the appellant's office. He told her she could make a personal bond on those warrants and not to worry, that she wouldn't need a lawyer. She was directed to plead guilty and get the money to pay the checks. At this time, she was pregnant, and the judge put his arms around her back and buttocks and tried to kiss her.

After this meeting she went to court every Tuesday and when a check appeared on the docket, appellant asked if she had the money to make restitution. If she had it, it was paid, and if not, she was given two or three weeks to pay the check. Each time she would plead guilty, the sentence was suspended and after payment of court costs the sentence was remitted.

In March, 1973, she was arrested on other worthless check cases. It was about this time that newspaper publicity was released concerning Judge McDonald's handling of her cases.

After the arrest, she called the judge from jail, to see if she could make a cash bond. She was told a friend would do it, and that was all he could do for her.

In April, 1973, she testified before the Madison County Grand Jury and after two days of testimony, she related to the jury the circumstances involving her relationship with Judge McDonald.

Judge McDonald testified Cheryn Forsythe had three worthless check cases and a bigamy case pending in the Madison County Court. The warrants on the check charges were executed on October 2, 1972, and continuances were given from time to time. On her appearances in court on these cases, she was sentenced to thirty days. Subsequently, some police officers told him she was working as an informer on a series of robberies and they requested him to keep her out of jail. He agreed to cooperate and saw to it that she was not imprisoned. She received a thirty day sentence. It was suspended pending payment of fine, and later this sentence was suspended.

She had been to his office once on the Southern Airline case and again on a board and lodging case when accompanied by the police. He did not ask her to meet him at a parking lot, Governors Drive, or at the Big Gun Store, and did not go to Fann Realty with her. When he was consulted on the worthless check warrants, he encouraged her to make restitution. He denied kissing or putting his arm around her at any time.

As to Brenda Gwathney, the evidence submitted was: In August, 1972, she went to Judge McDonald's court to answer a worthless check charge. She entered a plea of guilty and made restitution on that date. Not having enough money to pay the fine, appellant continued the case so she could get the money. The case was suspended for payment until September 5, 1972, and when she was unable to pay,

she went to see Judge McDonald. While talking to him in his chambers, he asked where she lived and worked. As she got up to leave, appellant tried to kiss her and said he would give her another week or so.

The case was again continued at her request to October 10, 1972. At the October setting, she was late for her appearance in court and went to the judge's chambers again. She still didn't have the money to pay the fine and was upset because of the pending jail sentence. Judge McDonald sympathized and continued the case. As she was leaving, he put his arms around her and kissed her. The door to the judge's chambers was closed on each occasion. Her testimony about the last visit was:

"A. He asked if I could get out at night and I told him no, that I couldn't.
"Q. Did he say anything about your case?
"A. Just that he would give me all the time that I needed."

The last day she went back to court, she didn't see Judge McDonald, but was informed by one of the girls in the office that her case had been dropped.

Judge McDonald stated to his knowledge, Brenda Gwathney was not sentenced to jail on her first appearance in his court. The case was continued several times. One continuance was due to a death in her family.

Restitution had been made on the check, and the fine and costs were remitted. On the occasion she came to his chambers, he recalled putting his arm around her and escorting her to the door. He denied kissing her or asking her if she could get out at night.

The facts relating to Laura Blann as disclosed by the record were: In October of 1972, she appeared in Judge McDonald's court on a forgery charge.

At her first appearance, the preliminary hearing was "overruled", but she continued to return because of additional charges. Testimony regarding her first conversation with appellant was:

"Q. All right. Now, tell the Court and the jury, please, exactly what happened that time when you first had a conversation with the Judge.
"A. He asked me to come to his office, that he would like to talk about my cases with him. So, I went in his office alone, leaving my husband standing outside, and he said, 'Well, I'm concerned about all these forgery charges you have.' Said, 'How have you got them?' I explained to him that I had done it and that they had sent my checks up for fingerprints and that they was coming back just one at a time, they would arrest me as they came in.

. . . .

"Q. You told the Judge you were guilty, you had done it?
"A. Yes, sir. He told me not to ever plead guilty.
"Q. The Judge told you what then?
"A. He told me not to worry about it and not to plead guilty, that he would talk for me and he would get everything squared away.

. . . .

"A. He said, 'Don't plead guilty to anything, regardless of what it is, because you always have a chance of beating it in Court.'
"Q. The Judge told you that?
"A. Yes, sir.
"Q. Before he said that, had he said anything to you — had he given you any compliments or anything like that, or did he just get right into it?
"A. Yes, he told me I had beautiful eyes.
"Q. Go ahead. What, if anything, happened?

"A. Then he told me not to worry about the bigamy charge, that the State wouldn't prosecute a woman on bigamy anyway.

. . . .

"Q. Did he touch you in any way?
"A. Yes. He put his hands on me.
"Q. Where were you seated?
"A. I was sitting on his sofa in his office.
"Q. Where was he?
"A. He was sitting beside me, when I got up to leave he put his arm around me and he tried to kiss me, and I turned my head and he did kiss me on my cheek.
"Q. He tried to kiss you on the mouth?
"A. Yes.
"Q. Where all did he touch you? Just tell the Court and jury.
"A. He touched me on my breast and he rubbed my leg.

. . . .

"A. He asked me did my husband follow me around and was there any possible way I could meet him, and then he said, 'Well, we better go back in the Courtroom. The recess is over.'
"Q. You didn't give him an answer at that time?
"A. No.
"Q. Did he ask you to call him?
"A. Yes, he told me I could call him any time I needed him, any time that I was arrested and needed a bond dropped, or either — any of my friends that needed any help in getting their bond cut down, he would help."

The next conversation she had with appellant was when she was arrested on forgery and "pretense" charges and placed in the Madison County Jail. She telephoned the judge to continue her preliminary hearing. He told her the case would be set up, but she should call him when she got home.

After a couple of days, she phoned the judge and was asked to come to his office that afternoon. He explained one had to be careful talking over the telephone. Upon arrival at his office, the judge locked the door and asked if she would like a drink. When she refused, he said he was a "scotch man" and gave her a bottle of bourbon. He again put his hands on her and tried to kiss her. She was asked to meet him at the Tourway Inn and was told he would give her a room key. She responded that she had a dental appointment and couldn't meet him.

On the night of April 27, 1973, she was in the Madison County Jail with Cheryn Forsythe, but denied Cheryn made any suggestion that she, Laura Blann, could help herself by testifying against the judge. She also denied having been shown any map of the judge's office.

Appellant testified he did not know Laura Blann until her case came before his court but remembered having one conversation with her in his chambers.

She approached him at the door of his office and asked to speak to him. It was just before 10:00 A.M., and to his knowledge, he did not lock the door. He sat at his desk and she sat on the couch or in a chair.

A bigamy charge was pending against her, and he advised her to have a lawyer; that she was presumed to be innocent, and if so, should not plead guilty. Nothing was mentioned about her calling him, and he did not recall any occasion when he offered her a drink. He did not give her any whiskey and did not ask her to meet him at the Tourway Inn.

No offer of a key to Tourway Inn or to help her friends was made, nor did he rub her leg or kiss her.

As to the anonymous witness, the testimony was:

Around March, 1971, an auto theft charge against her brother was pending in appellant's court. She went to the

judge to ask if a bond could be set and was told it would cost a hundred dollars for his release.

After borrowing the money, the bond was made and appellant arranged for her brother to be brought down to the courtroom. While they were waiting for her brother, the following occurred:

"A. While they were bringing my brother down my mother was sitting out in the lobby, and the Judge said that he would like to meet me some other place and talk to me about my brother.
"Q. Your mother didn't hear this did she?
"A. No.
. . . .
"Q. And so the Judge said what now?
"A. He said that he would like to meet me some other place and talk to me about my brother's case.
"Q. What, if anything, did you say?
"A. I said okay.
"Q. What, if anything, did he do then or say?
"A. He said that I would meet him at Fann Realty at 7:00.
. . . .
"Q. No. Did you go with the Judge or did you drive your own automobile or what?
"A. I drove my own automobile.
"Q. Did you know where to go?
"A. No, I followed the Judge.
"Q. Where did you meet up with the Judge?
"A. Out here in front of the Courthouse.
"Q. And you followed him?
"A. Yes, I did.
"Q. And when you got to Fann Realty, did you go inside?
"A. Yes, I did.
"Q. Did you go in together or how?
"A. Yes, I think he was waiting in the car when I pulled in.

"Q. What, if anything, happened then? Go ahead and tell the jury and Court what, if anything, happened.
"A. I went inside and I thought that I was going to talk to the Judge about my brother.
"MR. MANNING: We object to what she thought.
"THE COURT: You object to what?
"MR. MANNING: I'm objecting to a mental operation. She testified to what she thought.
"A. No, I'm testifying to what I thought.
"Q. Just tell what you said, what he said, what you did and what he did. Now, what, if anything, happened after you got inside, what did the Judge say or do?
"A. I went inside with the Judge. I was sitting there, I was ready to talk to him about my brother's case because I knew that he was not guilty of taking the car. I did not go there —
. . . .
"Q. Did he get you a drink before that or did y'all have a drink?
"A. No, I didn't.
"Q. He fixed himself one?
"A. Yes.
"Q. After he fixed himself a drink, what did he do?
"A. He asked me to take my clothes off.
"Q. Did y'all have sexual relations there at the time?
"A. Yes.
"Q. After he finished, what, if anything, did he say to you? Did he ask you to call him?
"A. Yes, he did."

She next saw the Judge in reference to a speeding ticket and asked that payment be postponed until she could get the money. Later she received a letter indicating she would be in contempt if she did not come to court. When she saw the judge in his chambers, he told her the case had been continued but the letter was his only way of getting to see her. While they were in his chambers alone, he walked up

behind, reached under her arms and starting feeling of her breasts. She asked him "to let her go" and she left. He did tell her he would continue her case again.

Later in 1973, she again met the judge at Fann Realty concerning a peace bond against her husband. She had known appellant for about ten years and had seen him a few times in the clubs where she had worked as a barmaid.

Judge McDonald testified this witness would sometimes stop by his office on her way to the Registrar's office. In March, 1973, she came to see him in his office regarding a criminal charge pending against her brother. She wanted to get him out of jail and appellant advised her that a hundred dollar bond would have to be made. A cash bond was posted and her brother was released.

He denied asking her to meet him at Fann Realty or any other place. In February, 1973, she wanted a peace bond, and in March, telephoned him at home about another peace bond.

He told her to meet him at the courthouse basement. Arriving about 6:15 P.M., he said they would have to talk at the jail and she asked if they could talk elsewhere. Ultimately, they drove to a large parking lot. He sat in her car while they discussed the peace bond. After the conversation they each left in separate cars.

On the way home he stopped and greeted a friend at Fann Realty. Subsequently, the above mentioned witness walked in and after a short while the three left. He talked with her a minute in the parking lot concerning a speeding ticket.

He did not ask her to remove her clothes, and did not have sexual relations with her. At no time afterwards did he ever see her at the Fann Realty office.

He denied ever having a key to the back door of Fann Realty. The only time he had keys to the front door was

when he hung pictures in the office, and these were left in the door when he finished.

Numerous grounds have been urged upon this court for a reversal of the judgment and although each and every one was considered separately and severally, only the pertinent ones will be reviewed here. In that regard, we believe the principal question necessary for rendering a decision in this matter involves the admission of "similar transactions" to show intent, motive, design and scheme.

It is a well recognized rule that in a prosecution for a particular offense, proof tending to show that accused is guilty of committing other crimes at other times is inadmissible, even though they are similar to the one charged in the indictment. *Gassenheimer v. State*, 52 Ala. 313.

The opinions in *Fall v. U. S.*, 49 F. 2d 506, *White v. State*, 159 S. E. 897, *Scott v. State*, supra, and *Roden v. State*, 5 Ala. App. 247, 59 So. 751, sufficiently cover the rule governing admission of testimony about similar transactions of the defendant in bribery cases.

It is well to note, however, that although the general rule excludes evidence of similar offenses for the purpose of showing bad character of the accused, exceptions are recognized if relevant for any purpose other than to show a mere propensity by the defendant to commit the crime charged. *Gassenheimer v. State*, supra; *Dennison v. State*, 17 Ala. App. 674, 88 So. 211.

In our determination of this issue involving the admission of "similar transactions," we assessed the testimony in the light of certain limitations outlined by defense counsel.

First, we found that a connection and pattern existed between the similar transactions and the offense charged. This was indicated by the following facts from the testimony of the four witnesses:

1. All were women defendants or were interested in matters pending before the judge.
2. Each one went to the judge's chambers.
3. After each entered, the door was closed.
4. Each one was alone with the judge in his chambers.
5. Judge offered each aid or help in matters pending before him.
6. The judge hugged, kissed or touched each.
7. All were asked to meet the judge.

Second, appellant's transactions with the respective witnesses were not too remote in time; *U. S. v. Cochran*, 499 F. 2d 380, and occurred within these intervals:

Braidfoot	November - December, 1971.
Forsythe	October, 1971 - October, 1972.
Gwathney	September - October, 1972.
Blann	December, 1972 - January, 1973.
Anonymous	March, 1971 - March, 1973.

Third, evidence of the similar transactions was admissible even though the proof shown was not sufficient to prove the similar offenses beyond a reasonable doubt. *Scott v. State*, supra.

Fourth, the general rule excluding evidence of similar transactions does not apply when it is material to the inquiry to show the intent with which the act charged was committed. *Roden v. State*, supra.

After admission of this evidence, in order to insure that no prejudice accrued to appellant, the trial judge admonished the jury as to the purpose of the evidence and at the close of the trial, again instructed the jury in this manner:

> "Now, the State has made an effort to show by that evidence that the Judge has committed some other similar offenses, that is, similar to the ones [sic] charged in the Indictment, and the State, contends that

> he did commit other similar offenses. Now, once again, I'm not saying whether that contention on the part of the State is true or false, but it does present an issue, it's for the jury to say whether it's true or false. At the conclusion of that kind of evidence I limited that evidence, as you remember, to your consideration of the question of the intent that the Judge may or may not have had in the case that we are trying, and to the scheme or plan or action that he may have had in his dealing with this Braidfoot woman named in the Indictment.
>
> . . . .
>
> "Now, we are not trying him for these other offenses, it's merely evidence, and that evidence is to be limited in your consideration of the case that we are trying, as to the question of intent, scheme or plan"

Based on the foregoing, our judgment is the court's action in admitting the testimony of similar transactions showing intent, motive, design and scheme was proper.

III

It is strongly insisted by appellant that the evidence was insufficient to authorize a conviction.

To constitute an offer to accept a bribe, the thing solicited must be valuable and may be some act. *Caruthers v. State*, supra.

The Alabama statute condemns an offer to accept a bribe by promise of a "thing of value", and a conviction may be had on proof that an offer to accept by an accused was made in exchange for his official partiality in matters pending before him.

Although the evidence before the jury was in dispute, it could be inferred from this statement in Braidfoot's testimony, "if I met him at the Kings Inn we could talk about the situation and maybe take care of it," appellant was asking for a "thing of value" or an "act beneficial to" himself.

The word "value" is not limited to desirable things generally received in bribery cases. The test of value is the thing in question. *Scott v. State*, supra.

Authorities have shown that relevant, similar transactions as those committed by appellant are admissible. *Fall v. U. S.*, supra; *White v. State*, supra; *Scott v. State*, supra; and *Roden v. State*, supra.

Appellant argued the "pattern" evidence was inadmissible as nothing of value was solicited of Braidfoot or the others. A similarity between the Braidfoot matter and the pattern testimony is apparent. It could reasonably be inferred that appellant's intent, motive, design and scheme in all of the transactions were the same and it was his intent to exchange his high judicial functions for what he personally desired.

Where there is legal evidence, as in this case, from which the jury can by fair inference find the accused guilty, this court has no right to disturb the verdict. *Haggler v. State*, 49 Ala. App. 259, 270 So. 2d 690.

AFFIRMED.

All the Judges concur.

DECISION AND DISSENTING OPINION ON APPLICATION FOR REHEARING

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1974-75

8 Div. 524

Thomas D. McDonald

v.

State

Appeal from Madison County Court

JUNE 30, 1975

ON REHEARING

APPLICATION OVERRULED.

Cates, P. J., Tyson, Harris and DeCarlo, J. J., concur.

Bookout, J., dissenting:

The indictment charges that appellant, ". . . did . . . unlawfully and corruptly accept or agree to accept . . . a promise to do an act beneficial to the said Thomas D. McDonald, . . . , to-wit: Sexual intercourse, the promise of sexual intercourse . . . from one . . . Myra Braidfoot Layton, a woman, under an agreement or with an understanding that his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, . . . , being a criminal prosecution of said Myra Layton Braidfoot, . . . , charged with Grand Larceny under the laws of the State of Alabama," and that he "would dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, reduce or cause to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial to said Myra Layton Braidfoot . . ."

Mrs. Braidfoot testified that on her third visit to the Judge's chambers, "he said if I met him at the King's Inn we *could talk* about the *situation* and *maybe* take care of it." She told him she would meet him there. Appellant made no promise or agreement to do anything specifically about the case. He only agreed "to talk about the situation and *maybe* take care of it." (Emphasis supplied).

The appellant's conduct with other women certainly shows pattern, motive, or intent, however, intent alone is insufficient to support the positive averments spelled out in the indictment. The above conversation lacked specificity of action by the appellant as charged in the indictment. On reviewing the evidence, I am unable to find an actual promise or agreement that appellant would dismiss or nol-pros Mrs. Braidfoot's case in exchange for her favors. He suggested meeting and talking, and although we may believe from his pattern of conduct he would make an illegal proposition, nevertheless, we do not know for he never got to that point.

After considering the application for rehearing, I have sufficient doubt that I now believe the seriousness of the case and charges involved deserve our review on rehearing.

EXCERPTS FROM THE PETITION FILED BY PETITIONER McDONALD IN THE SUPREME COURT OF ALABAMA FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

IN THE SUPREME COURT OF ALABAMA
EX PARTE THOMAS D. McDONALD
IN RE: THOMAS D. McDONALD,
APPELLANT

VS.

STATE OF ALABAMA, APPELLEE
(In the Court of Criminal Appeals, 8th Division No. 524)

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF ALABAMA:

Now comes your Petitioner, Thomas D. McDonald, and hereby respectfully petitions this Honorable Court for a writ of certiorari directed to the Court of Criminal Appeals of Alabama, commanding and requiring said Court to certify and send to this Court, on a day certain to be designated by this Court, a full and complete transcript of the record and all proceedings of said Court of Criminal Appeals in that certain cause in said Court styled Thomas D. McDonald, Appellant, vs. The State of Alabama, Appellee, and bearing docket number "8th Division No. 524," to the end that said case may be reviewed and determined by the Supreme Court of Alabama in accord with law, and as provided by the rules and practice of this Court, and that this Court thereupon proceed to review and correct the errors hereinafter complained of by Petitioner in that certain judgment and opinion rendered by the said Court of Criminal Appeals in said cause on the 27th day of May, 1975,

and that this Court revise, reverse, and hold for naught said judgment and opinion of the said Court of Criminal Appeals, which affirmed the judgment of the Circuit Court of Madison County, Alabama, or that this Court render such judgment as the Court of Criminal Appeals should have rendered in said case.

Your Petitioner avers that he is the same person as the Appellant in that cause in the Court of Criminal Appeals hereinbefore referred to; that he duly made application to said Court of Criminal Appeals for a rehearing of the points and decision of said Court herein complained of, accompanied by a brief in support thereof, and that said Court overruled and denied Petitioner's said application for rehearing on June 30, 1975.

Your Petitioner further shows unto this Honorable Court that the Court of Criminal Appeals erred in its said judgment and opinion as follows, separately and severally: (Pet.p.1)

* * *

ASSIGNMENT OF ERROR NO. IV

The decision of the Court of Criminal Appeals is in conflict with a prior decision of the Supreme Court on the same poin of law.

There was *no* evidence of an *agreement* between Petitioner and Myra Braidfoot that Petitioner would "dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed . . ." the criminal prosecution against Myra Braidfoot which was specified in the indictment, and that, in return, she would give the Petitioner "sexual intercourse, the promise of sexual intercourse, . . ." There was no evidence of essential elements of the crime charged in the indictment. The Supreme Court, in *Clemons v. City of Birmingham*, 277 Ala. 447, 171 So. 2d 456, speaking through Mr. Justice Lawson approved the principle that "a conviction will not

be sustained unless there is evidence of every essential element of the offense," and said:

> "In dealing with the question thus presented, we are not concerned with the sufficiency of the evidence, but with the question as to whether Clemons' conviction rests upon any evidence at all, for it is a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States to convict and punish a person without any evidence of his guilt. — *Thompson v. City of Louisville*, 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654; *Garner v. Louisiana*, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207."

In *Frederick v. State*, 20 Ala. App. 336, 102 So. 146 (1924), wherein the appellate court held that the evidence was insufficient to convict appellant of possession of prohibited liquors, the Alabama Court of Appeals said:

> "To convict this defendant of the unlawful possession of the liquor in question under these facts would be the usurpation of judicial authority not conferred by law. The measure of proof necessary and the burden resting upon the state was to show by the evidence, and the evidence alone, that the defendant was guilty as charged beyond all reasonable doubt and to a moral certainty. This burden the state failed to meet, and the evidence adduced was not sufficient to overcome the presumption of innocence which attended the accused upon this trial . . .
> This court has many times announced that the same rules of evidence and procedure obtained in prosecutions for a violation of the laws enacted for the suppression of the evils of intemperance, as in all other criminal prosecutions, and until the state makes out its case by meeting the burden resting upon it courts or juries have no right or authority to convict, for *the fundamental law of the land is that in all criminal prosecutions the accused * * * shall not be deprived of life, liberty, or property, except by due process of law.* Const. 1901, §6."

In *Frederick*, supra, the Alabama Supreme Court denied certiorari. *Ex Parte State Ex Rel. Attorney General*, 212 Ala. 158, 102 So. 147.

For absence of *any* evidence of at least one element of the crime charged (i.e., the corrupt agreement alleged in the indictment), Petitioner was convicted in violation of the due process of law clause of §6 of the Constitution of Alabama 1901, and of Amendment Fourteen to the United States Constitution. The decision of the Court of Criminal Appeals holding the evidence sufficient to support the conviction is, therefore, in conflict with the above-quoted statements of the law by the Supreme Court in *Clemons v. City of Birmingham*, supra, and by the Court of Appeals in *Frederick v. State*, supra, and the Court of Criminal Appeals erred in failing to follow the decisions of the Supreme Court on the same point of law. (Pet.pp.6-7)

* * *

ASSIGNMENT OF ERROR NO. XIV

If Petitioner is mistaken in his allegation under "Assignment of Error No. IV", supra, that the decision of the Court of Criminal Appeals is in conflict with a prior decision of the Supreme Court on the same point of law, i.e., that if there is a conviction of crime unsupported by evidence of the existence of one or more elements of the crime charged, the conviction is obtained in violation of Amendment Fourteen to the Constitution of the United States, Petitioner says that a basis of this petition for writ of certiorari to the Court of Criminal Appeals is that a material question was one of first impression in the appellate courts of Alabama and was incorrectly decided.

There was *no* evidence that the Petitioner *made an offer* to Myra Braidfoot that he would, as alleged in the indictment, "dismiss or cause to be dismissed, nol-pros or cause

to be nol-prossed . . .", etc., the case pending in the Madison County Court against Myra Braidfoot if she would, as alleged in the indictment, give him a "gift, gratuity or other thing of value," or "do an act beneficial" to him, and there was no evidence of a bilateral agreement between Petitioner and Myra Braidfoot to such effect. The Court of Criminal Appeals therefore erred in holding in its decision that the evidence supported conviction of Petitioner if, as contended by Petitioner, his conviction in the absence of such evidence was in violation of the Fourteenth Amendment to the Constitution of the United States.

ASSIGNMENT OF ERROR NO. XV

A basis of this petition for writ of certiorari to the Court of Criminal Appeals is that a material question was one of first impression in the appellate courts of Alabama and was incorrectly decided. The question is whether or not, if there is *no* evidence adduced at an accused's trial of one or more elements of the crime charged, a conviction of the accused is obtained in violation of the Thirteenth Amendment to the Constitution of the United States, in that the conviction imposes involuntary servitude upon the accused in violation of said Amendment.

There is *no* evidence that, as alleged in the indictment, Petitioner accepted or agreed to accept from Myra Braidfoot "sexual intercourse, the promise of sexual intercourse . . . ," etc., under an agreement or understanding with her that he would "dismiss or cause to be dismissed, no-pros or cause to be nol-prossed, . . .", etc., the criminal prosecution then pending against Myra Braidfoot. Such are essential elements of the crime charged. In its decision holding the evidence against Petitioner was sufficient to sustain the conviction, the Court of Criminal Appeals by necessary implication held that a conviction without evidence of such ele-

ments is *not* a violation of the Thirteenth Amendment to the United States Constitution, and the Court of Criminal Appeals erred in such holding and decision.

* * * * * * * * *

WHEREFORE, your Petitioner respectfully requests that this petition for writ of certiorari be granted; that this Honorable Court will review and revise the aforesaid Opinion and Decision of the Court of Criminal Appeals; that the Court of Criminal Appeals be directed to reverse and revise the judgment of the Circuit Court of Madison County, Alabama; that this Honorable Court will set aside the Order and Judgment of the Court of Criminal Appeals affirming the Judgment of the Circuit Court of Madison County; or that this Court will render such judgment as the Court of Criminal Appeals should have rendered in said cause.

Attached to this petition, marked as Exhibit "A" thereto, is a true, correct and complete copy of the Opinion of the Court of Criminal Appeals referred to herein, and same is made a part hereof by reference.

Submitted herewith is a brief in support of this petition.

Respectfully,

WATTS, SALMON, ROBERTS,
MANNING & NOOJIN
Attorneys for Petitioner,
Thomas D. McDonald

By: /s/ GLENN F. MANNING
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P. O. Box 287
Huntsville, Alabama 35804
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(Pet.pp.21-22)

ORDER OF SUPREME COURT OF ALABAMA GRANTING WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
SPECIAL TERM 1975

SEPTEMBER 30, 1975

SC 1375

EX PARTE: THOMAS D. McDONALD
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(RE: THOMAS D. McDONALD V. STATE OF ALABAMA)

Upon a preliminary examination of the petition in the above cause, the Court concludes there is probability of merit and has today granted the writ.

IT IS, THEREFORE, ORDERED that the Writ issue to the Court of Criminal Appeals, and that this cause stand ready for submission on briefs or oral argument, if so desired, in accordance with Amended Supreme Court Rule 39.

ORDER OF SUPREME COURT OF ALABAMA QUASHING WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

APRIL 9, 1976

SC 1375

EX PARTE: THOMAS D. McDONALD
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(RE: THOMAS D. McDONALD V. STATE OF ALABAMA)

WHEREAS, on September 30, 1975, a Writ of Certiorari to the Court of Criminal Appeals was granted by this Court, and this cause was set down for submission pursuant to Supreme Court Rule 39.

WHEREUPON, come the parties and the Petition for Writ of Certiorari to the Court of Criminal Appeals being duly submitted and examined and understood by the Court, it is considered by the court that the writ heretofore issued should be quashed, and that the petition should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the writ of certiorari heretofore issued to the Court of Criminal Appeals be, and the same is hereby, quashed, and the petition be, and the same is hereby, denied, at the costs of the petitioner, for which costs let execution issue.

EXCERPTS FROM PETITIONER'S BRIEF ON APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA, TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

PROPOSITIONS OF LAW

27

It is a violation of the due process clause of the Fourteenth Amendment to the United States Constitution to convict and punish a person without any evidence of his guilt.

THOMPSON V. CITY OF LOUISVILLE (1960)
362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654

GARNER V. LOUISIANA
368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207

ANNO. 80 A.L.R. 2d, 1362-1376

ANNO. 15 L. Ed. 2d, 889-898

Frederick v. State (1924)
20 Ala. App. 336, 102 So. 146, cert. den.
Ex Parte State Ex Rel Attorney General,
212 Ala. 158, 102 So. 147

Clemons v. City of Birmingham
277 Ala. 447, 171 So. 2d 456

Barr v. Columbia (1964)
378 U. S. 146, 12 L. Ed. 2d 766, 84 S. Ct. 1734

Gregory v. Chicago
394 U. S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946

21 Am. Jur. 2d, *Criminal Law*, § 226, p. 265

16 C.J.S., *Constitutional Law*, § 589, p. 1182
(Br.pp.PL-12-13)

28

A state court conviction in which there is no evidence of one or more constituent or essential elements of the crime

charged is so totally devoid of evidentiary support as to constitute a denial of due process and thereby violate the Fourteenth Amendment to the Constitution of the United States.

JOHNSON V. FLORIDA (1968)
391 U. S. 596, 20 L. Ed. 2d 838, 88 S. Ct. 1713

TAYLOR V. LOUISIANA (1962)
370 U. S. 154, 8 L. Ed. 2d 395, 82 S. Ct. 1188,
reh. den. 370 U. S. 965, 8 L. Ed. 2d 834, 82 S. Ct. 1578

ANNO. 80 A.L.R. 2d pp. 1362-1376

ANNO. 15 L. Ed. 2d 889-898

Mauldin v. State (1937)
28 Ala. App. 30, 177 So. 309

Taylor v. Louisiana (1962)
370 U. S. 154, 8 L. Ed. 2d 395, 82 S. Ct. 1188,
reh. den. 370 U. S. 965, 8 L. Ed. 2d 834, 82 S. Ct. 1578

Brown v. Louisiana (1966)
383 U. S. 131, 15 L. Ed. 2d 637, 86 S. Ct. 719

Shuttlesworth v. Birmingham (1965)
382 U. S. 87, 15 L. Ed. 2d 176, 86 S. Ct. 211

Thompson v. City of Louisville, supra (Proposition of Law 27)

U. S. Ex Rel. Mallory v. Myers (1964, D. C. Pa.)
240 F. Supp. 373, affd. (CA 3) 343 F. 2d 912, cert. den.
381 U. S. 943, 14 L. Ed. 2d 706, 85 S. Ct. 1781

U. S. Ex Rel. DeMoss v. Pennsylvania (1963,
CA 3 Pa.)
316 F. 2d 841, cert. den. 375 U. S. 859, 11 L. Ed. 2d
85, 84 S. Ct. 123 (Br.pp.PL-13-14)

29

To jail a man convicted without evidence of guilt is to impose involuntary servitude, in violation of the Thir-

teenth Amendment to the Constitution of the United States.

Caminito v. Murphy (1955, CA 2 N.Y.)
222 F. 2d 698, cert. den. 350 U. S. 896, 100 L. Ed. 788,
76 S. Ct. 155) (Br.p.PL-14)

30

If the court which renders a judgment does not have jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and the court does not have jurisdiction to sentence a prisoner when a judgment against him is obtained in violation of a constitutional right, and in such case habeas corpus is available to the prisoner to obtain his freedom.

Ex Parte Nielsen (1889)
131 U. S. 176, 182, 33 L. Ed. 118, 120, 9 S. Ct. 672

Moore v. Dempsey
261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265
(Br.pp.PL-14-15)

31

If an accused is deprived of a fundamental constitutional right in his trial, the whole proceeding is a mere pretense of a trial, and the conviction and sentence are wholly void.

Brown v. Mississippi
297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461

Blackburn v. Alabama (1960)
80 S. Ct. 274, 361 U. S. 199, 4 L. Ed. 2d 242
(Br.p.PL-15)

• • •

ARGUMENT

• • •

Assignment of Error No. 20

The trial court erred in overruling (Tr.p.610) the timely motion of Defendant, made at the conclusion of the State's case in chief, and directly after the State rested its case (Tr.p.608) to exclude the evidence of the State as it pertained to Count One of the Indictment (Tr.pp.609-610). (Br.p.A-31)

* * *

The corpus delicti is competent evidence from which the jury would be authorized to draw a reasonable inference that the crime charged was committed, and the corpus delicti must be proved by clear and unequivocal evidence. *Sanders v. State*, 167 Ala. 85, 52 So. 417; *Clisby v. State*, 17 Ala. App. 475, 86 So. 140. In other words, the corpus delicti must be proved by substantial and reliable evidence, such that, upon substantial proof of the accused's connection with the crime, a jury would be authorized to convict (see authorities cited, Proposition of Law 19).

The corpus delicti of the crime charged in the indictment is substantial evidence from which the jury could reasonably infer the existence of *all* of the elements of the offense charged in the indictment. Such elements have been discussed in the Argument portion of this brief which is directed to the question of whether the trial court erroneously overruled the Defendant's demurrer to the indictment, and will not be repeated here. The corpus delicti rests exclusively upon the testimony of Myra Braidfoot, whose testimony relating to the corpus delicti consists solely of her testimony that in November 1971, or December 1971, while her grand larceny case was pending in the Defendant's Court, he "put his arm around my waist" (Tr.p. 186), and said, "if I met him at the King's Inn (at 10:00 a.m.) we could talk about the situation and maybe take

care of it" (Tr.p.186), or "we would look over the situation or the case" (Tr.p.220), and that she agreed to meet him there. She said she went to the Defendant's Court three times in connection with her arrest (Tr.p.182) and that the incident referred to occurred on the third occasion she went to court (Tr.p.186). Defendant's Exhibit 1 (Tr.p. 1462) was offered and accepted into evidence during the Braidfoot testimony (Tr.pp.199-200). Exhibit 1 is a certified copy of the official record of the Madison County Court pertaining to the Braidfoot grand larceny case, and reflects that she was arrested November 19, 1971; that the return day of the warrant was December 9, 1971; that she was represented by Mr. Ralph Slate, a Decatur, Alabama attorney; that on December 9, 1971, the return day of the warrant, the case was continued to December 16, 1971; that on December 16, 1971 she demanded a preliminary hearing, which was set for December 22, 1971, and, on December 22, 1971, she waived the case to the grand jury. The third occasion the Braidfoot woman went to court was, therefore, presumably on December 22, 1971 when the case was waived to the grand jury.

The woman admitted (Tr.p.211) to having been convicted under three indictments of forgery in Morgan County, and sentenced to eighteen months in the penitentiary in each case, the sentences to run concurrently, and she was on probation at the time she testified to the grand jury, and she also admitted that she had been convicted of petit larceny in the Justice Court of the City of Decatur (Tr.p.214). She testified that she did not have sexual intercourse with the Defendant, and did not promise him sexual intercourse (Tr.p.210) and said that she did not meet the Defendant at the King's Inn, but went directly back to Decatur.

Assuming the truth of the Braidfoot woman's testimony, she told the Defendant she would meet him at the motel,

but there was apparently no intention on her part to do so, because she immediately left and returned to Decatur. She said she was "paranoid" at the proposal (Tr.p.187). Therefore, there was no understanding, and no "agreement," because there was no meeting of the minds. Even if there was, the agreement amounted to nothing more on its face than making an appointment to discuss her "situation." It may be indiscreet and inadvisable, but it is no more unlawful for a judge to confer with a person — even a person charged with a crime whose case is pending in his Court — at a motel than discussing the case in his office or in the hallways or lobby of a courthouse. Such an agreement would not be a "gift, gratuity, or other thing of value," and it would not be the acceptance of a "promise to do an act beneficial to . . . Thomas D. McDonald," particularly as, *under the allegations of the indictment*, the *"act beneficial"* is alleged to be *"sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship."* The Witness herself testified that there was no such promise. Further, there was no testimony in the case tending to establish an agreement or understanding between the Defendant and the Braidfoot woman that, as alleged in the indictment, the Defendant, in consideration of a promise of sexual favors "or relationship" (which did not exist) from the woman, he would "dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, reduce or cause to be reduced, etc." the criminal case against Myra Braidfoot. Nor can a *reasonable* inference be drawn from the Braidfoot testimony of a "corrupt intent" on the part of the Defendant. (Br.pp.A-37-40)

• • •

Not only must there be evidence of the corpus delicti of the crime charged before so-called "pattern" evidence is admissible, but the corpus delicti must be proved by clear and

unequivocal evidence (see authorities cited, *supra*). The testimony of the Braidfoot woman was inconclusive, inconsistent, confusing, contradictory, and equivocal. Furthermore, she was a convicted felon and thief (Tr.p.211; Tr. p.214), and, as such, there is "a violent presumption against (her) truthfulness under oath." *Smith v. State*, 129 Ala. 89, 29 So. 699; *Sylvester v. State*, 71 Ala. 17; *Taylor v. State*, 62 Ala. 164. (Br.p.A-41)

• • •

The corpus delicti of the alleged crime not having been proved by the required measure of proof when the State rested its case in chief, the trial court erred in denying the motion of Defendant, made at the conclusion of the State's testimony, and directly after the State rested, to exclude the State's evidence (Tr.pp.608-610). (Br.p.A-53)

• • •

VII

Written Requests for Affirmative Charge for Defendant
Assignment of Error No. 34

The trial court erred in failing and refusing to give to the jury the following written charge requested by the Defendant:

"DEFENDANT'S REQUESTED CHARGE NO. 102

The Court charges the Jury that you cannot find the Defendant guilty under Count One of the indictment of corruptly accepting a bribe.

Refused:
/s/ L. S. Moore
Circuit Judge."

• • •

The statute defining the crime attempted to be charged relates to two crimes, i.e., accepting a bribe and agreeing to accept a bribe. They are two separate and distinct offenses, and the indictment attempts to charge both, in the alternative. The Defendant requested the general affirmative charge as to *each*, and if the request was erroneously denied as to *either*, this Court must reverse the judgment of conviction. Such is well settled, and requires no citation of authority. The foregoing Assignment of Error relates to the offense of accepting a bribe.

The question of whether Defendant's written requested charge quoted above should have been given turns exclusively over whether or not the corpus delicti of the crime defined by the statute, *as limited by the indictment*, was established by the State by the degree of proof required, i.e., by *substantial* evidence authorizing *a reasonable inference* that the crime charged, if any, was committed. See authorities cited to Proposition of Law 52, Proposition of Law 19.

It is, first, strenuously contended by Defendant that the indictment does not, *on its face*, allege a crime defined by the statute. In such connection, the Court is referred to the authorities cited, and the Argument portion of this brief, directed to Defendant's Assignment of Error No. 2, pertaining to the demurrer to the indictment, and appearing in Section III of this Argument, and Defendant adopts by reference the pertinent portions of same and directs them to his Assignment of Error No. 34.

Assuming that sexual intercourse, or a promise of sexual intercourse, can be the consideration for the crime of accepting a bribe (and Defendant contends that, under the Alabama statute, it cannot be, if the words of the statute are given their usual meaning, and in view of the principle that statutes defining criminal acts must be strictly con-

strued, and any ambiguities therein are to be construed in favor of the accused) , the elements and material allegations of the specific crime charged to the Defendant in the indictment are:

1. Defendant *corruptly* accepted a "gift, gratuity, or *other thing* of value" from Myra Braidfoot,

or

2. Defendant corruptly accepted from Myra Braidfoot a *promise* to make him a gift,

or

, 3. He corruptly accepted from Myra Braidfoot a promise to "*do an act* beneficial to him," viz: sexual intercourse, *or* the promise of sexual intercourse, *or* the promise of "other sexual favors," *or* the "promise of . . . other relationship,"

and

4. The acceptance of any of the foregoing from Myra Braidfoot was under an agreement (or understanding) with her that "his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side," of that certain case in the Madison County Court styled "State of Alabama v. Paul Duane Braidfoot, Myra Layton Braidfoot, Defendants, Case No. 97467, Madison County Court . . ."

and

5. That the Defendant, as Judge having jurisdiction of the above-described case, would, in his official capacity,

(1) Dismiss said case, *or*
(2) Cause said case to be dismissed, *or*
(3) "Nol-pros" said case, *or*
(4) Cause said case to be nol-prossed, *or*
(5) "Reduce" said case, *or*
(6) Cause said case to be "reduced", *or*

(7) Continue said case, *or*
(8) Cause said case to be continued, *or*
(9) Otherwise dispose of said case "in a manner beneficial" to Myra Braidfoot, *or*
(10) Otherwise cause said case to be disposed of "in a manner beneficial" to Myra Braidfoot.

The so-called "pattern testimony" cannot be considered in order to make out the corpus delicti. *Crow v. State*, 28 Ala. App. 319, 183 So. 897. Therefore, the corpus delicti was established by the Braidfoot woman's testimony and by the court records of her grand larceny case (Defendant Exhibits 1, 2, 3), or it was not established. The question, therefore, is whether her testimony was substantial evidence of *all* of the above-listed elements and material allegations of the indictment, from which a jury could *reasonably* infer their existence.

The only evidence of the corpus delicti was the Braidfoot testimony that the Defendant suggested that she "meet him at the King's Inn Motel at 10:00," "to talk about the situation and maybe take care of it" (Tr.p.186), and her statement that she said she would (Tr.p.187). She said she didn't keep the appointment, and it seems that she did not intend to do so (Tr.p.207, Tr.pp.186-187). Other issues aside, the question of whether Defendant serves three years in the penitentiary is determined by whether the jury was authorized to reasonably infer the existence of all of the elements and material allegations of the indictment from such testimony.

"Inference" is not a mere guess. This Court and the Alabama Supreme Court have said that, in legal parlance, as respects evidence, inference is a very different matter from supposition; that "inference is a *deduction from proven facts*", but that supposition "requires no such premise for its justification."

There was no *fact* in the Braidfoot testimony, giving it full weight and credence, and completely disregarding Defendant's testimony, from which a reasonable man could have deduced beyond a reasonable doubt that any of the elements of the cause of action existed. Braidfoot's alleged promise to meet Defendant at the King's Inn was not, and could not be, by any test, objective or subjective, in itself, a *thing of value*, which the statute requires the "gift" or "gratuity" to be. The alleged promise was not a promise of a "gift." The alleged promise was not a promise to "do an act beneficial" to Defendant, and certainly not, as alleged in the indictment, a "promise of sexual intercourse," or a "promise of other sexual favors," or "a promise of other . . . relationship" — all material allegations. There was no evidence of any "agreement" or "understanding" in consideration of the alleged gift, etc., or promise, that the Defendant would give "his act, opinion, decision or judgment in a particular manner," or "upon a particular side" of the Braidfoot larceny case — also material allegations of the indictment. There was no evidence that there was an alleged "agreement" or "understanding" that Defendant would "dismiss or cause to be dismissed, etc." the Braidfoot larceny case. Without evidence of an understanding or agreement that Defendant would do the things alleged, there plainly would be no fact upon which to base an inference that the Defendant entered into a "corrupt" agreement or understanding. As for any contention which may be made by the State that the Braidfoot testimony, with the attendant circumstances, proves the elements of the crime, Defendant points to the uniform rule in criminal cases that circumstantial evidence will not authorize a conviction unless it is "inconsistent with every rational hypothesis except that of guilt." See authorities cited to Proposition of Law 18.

Assignment of Error No. 35

The trial court erred in failing and refusing to give to the jury the following written charge requested by the Defendant:

"DEFENDANT'S REQUESTED CHARGE NO. 103

The Court charges the Jury that you cannot find the Defendant guilty under Count One of the indictment of corruptly agreeing to accept a bribe.

Refused:
/s/ L. S. MOORE
Circuit Judge"
(Tr.p.1434)

* * *

The portion of this Argument directed to Defendant's Assignment of Error No. 34, *supra*, is applicable to Defendant's Assignment of Error No. 35, and the contents thereof are adopted by reference and directed to Defendant's Assignment of Error No. 35.

Under the Braidfoot testimony, the Defendant *accepted* her promise to meet the Defendant at the King's Inn. He did not "*agree to accept*" anything at all. Therefore, assuming the State's case was completely made out on the charge of *accepting* a bribe, there was nevertheless no *agreement to accept* a "gift, gratuity, . . .", etc., and the Defendant was due to be granted his written requested charge no. 103, and its refusal was reversible error.

Assignment of Error No. 36

The trial court erred, separately and severally, in failing and refusing to give to the jury the following written charges requested by Defendant:

"DEFENDANT'S REQUESTED CHARGE NO. 96

The Court charges the Jury that you cannot find the Defendant guilty under Count One of the indictment.

Refused:
/s/ L. S. MOORE
Circuit Judge"
(Tr.p.1432)

"DEFENDANT'S REQUESTED CHARGE NO. 101

The Court charges the Jury that if you believe the evidence in this case you cannot find the Defendant guilty under Count One of the indictment.

Refused:
/s/ L. S. MOORE
Circuit Judge"
(Tr.p.1433)

* * *

The portions of this Argument directed to Defendant's Assignment of Error No. 34, and to Defendant's Assignment of Error No. 35, *supra*, are applicable to Defendant's Assignment of Error No. 36, and the contents thereof are adopted by reference and directed to Defendant's Assignment of Error No. 36.

VIII

Motion for New Trial
Assignment of Error No. 37

The trial court erred in its order or judgment made and entered on June 20, 1974, denying Defendant's motion for new trial, as amended (Tr.p.1512).

A

Weight of the Evidence

Even if the Defendant was not entitled to the general affirmative charge, the verdict is not supported by the legal

evidence, by the full measure of proof which the law requires, and is contrary to the preponderance of the evidence. In this connection, the Court is referred to Grounds 1, 2, 3, 4, 5, 6, 7, and 9 of Defendant's motion for new trial, as amended (Tr.p.1502).

The evidence against the Defendant consisted of the Myra Braidfoot testimony and the so-called "pattern testimony" of the female witnesses. Unless this Court holds, contrary to the general rule and its prior decision (Crow v. State, *supra*), that this "pattern testimony" supplies sufficient proof of corpus delicti, when added to the Braidfoot testimony, the posture of the case is the same as if such witnesses had not testified at all, in weighing the evidence. The "pattern testimony" evidence, even if it, or part of it, can properly be considered, however, is of slight relevancy to the charge of the indictment. Basically, assuming the Braidfoot woman's testimony is sufficient to establish the corpus delicti, the State's case is based upon her credibility, as opposed to the Defendant's credibility.

Of course, strong presumptions attend a jury verdict on issues of fact, and the jury's verdict on factual issues should not be disturbed if, under the evidence, reasonable, intelligent, honest, and conscientious persons, with understanding of the legal and factual issues, could believe, beyond a reasonable doubt, from the evidence, that the averments of the indictment are true. A scintilla of evidence is not sufficient, however; there must be substantial evidence (see authorities cited, Proposition of Law 19), and the evidence must be sufficient to authorize a reasonable inference of the guilt of the accused (see authorities cited, Proposition of Law 20), and where the great weight of the evidence was against the verdict so decidedly that it is evident that the verdict was wrong and unjust, the trial judge should grant a new trial (authorities cited, Proposition of Law 21), *notwithstanding that the evidence was such that the trial court could not properly have given the general affirmative charge against its rendition* (see authorities cited, Proposition of Law 22).

Generally, the assessment of the credibility of witnesses is a jury function, but a jury may not, at pleasure, and without regard to the elements of credibility which the testimony of the accused may possess, arbitrarily set aside his testimony and refuse to consider it. *Watts v. State*, 19 Ala. App. 549, 98 So. 914; *Melton v. State*, 26 Ala. App. 265, 158 So. 196; *Ammons v. State*, 20 Ala. App. 283, 101 So. 511; *McHugh v. State*, 30 Ala. App. 231, 3 So. 2d 569.

It is generally held that a conviction cannot be based on the uncorroborated testimony of a single witness (as was the case here) if such testimony is so indefinite, contradictory, or unreliable that it would be unsafe to rest a conviction thereon. 23 C.J.S., *Criminal Law*, Sec. 903, p. 541. It has been so held by this Court. *Melton v. State*, 26 Ala. App. 265, 158 So. 196; *Gilbert v. State*, 21 Ala. App. 672, 107 So. 925; *Gilbert v. State*, 20 Ala. App. 565, 104 So. 45. For example, in *Melton, supra*, this Court held that "if the only evidence connecting the accused with the crime charged consists of the testimony of the prosecuting witness only, *and the character of the prosecuting witness for veracity is impeached*, it is error for the trial court to deny a new trial, on the motion of the accused." *Melton* must be overruled before the conviction in the present case can be affirmed.

The only witness who testified against the Defendant on the substantive elements of the crime charged was Myra Braidfoot. The writer does not hesitate to say, knowing that the Justices of this Court will read her testimony with great care, that it was confusing, inconsistent, contradictory and wholly unconvincing. She was also a convicted felon

(three forgery convictions—Tr.p.211), and thief (Tr.p.214). At the time of trial, she was living in Kentucky (Tr.p.189), and she came from Kentucky to Huntsville to testify against the Defendant (Tr.p.215). She was twenty-two years old (Tr.p.215) and in her fifth marriage (Tr.p.189). She had been a police informant (Tr.pp.211-213). It has been said that "an infamous crime, the evidence of which is admissible as affecting the credibility of the person convicted upon being examined as a witness, is a crime which '*shows such depravity in the perpetrator or such a disposition to pervert public justice in the courts, as creates a violent presumption against his truthfulness under oath.*" *Smith v. State*, 129 Ala. 89, 29 So. 699, *Sylvester v. State*, 71 Ala. 17, *Taylor v. State*, 62 Ala. 164.

At common law, the Witness Braidfoot could not, as a matter of law, have testified against the Defendant, and he could not have been tried on this case. This was so, because of the presumption against such a person telling the truth, and incompetence to testify. The presumption against the truthfulness of such witnesses attends them today, but they are nevertheless, by statute, competent to testify.

The Defendant denied the pertinent testimony of Myra Braidfoot. Approximately sixty-five persons, all, or practically all, of whom were distinguished members of the Defendant's community, testified that the Defendant's general reputation before the Braidfoot incident was good; and that his reputation for incorruptibility in office was good. It was stipulated that approximately twenty-five others would so testify if they were sworn as witnesses. A number of the witnesses testified that the Defendant had a reputation for being a faithful and devoted husband. Three of the four Circuit Judges of the Circuit at the time, the Honorable David Archer, the Honorable Thomas N. Younger, and the Honorable John W. Green, Jr., attested unequivocally to

the Defendant's reputation for incorruptibility. The Probate Judge of the County, the Recorder of the City of Huntsville, the Deputy Recorder of the City of Huntsville, the City Attorney for the City of Huntsville, the President of Alabama A & M University, several members of the City Council of Huntsville, the former Mayor of Madison, Alabama, the former Mayor of Huntsville, Alabama and a former F.B.I. Agent, several present and supernumerary official court reporters of the Twenty-Third Judicial Circuit, the Madison County Tax Collector, the Madison County Tax Assessor, the present Circuit Court Clerk of Madison County, a former deputy Circuit Court Clerk, a former United States Attorney, and presently a United States Magistrate, a former member of the State Board of Bar Commissioners, the Huntsville Chief of Police, numerous members of the Madison County Bar, including the Honorable Pat Richardson, past President of the Alabama State Bar, bank officials, and numerous other distinguished citizens of Madison County testified to the Defendant's good general reputation and to his reputation for incorruptibility as a Judge. In fact, the State conceded the Defendant's good general reputation for both qualities. The evidence further showed a distinguished career as a jurist and as a civic leader. It can truly be said that a very large segment of the business, professional and political leadership of the City of Huntsville and of Madison County rallied to the Defendant's defense. It is true that almost anyone can obtain some character testimony, but they cannot obtain the kind of witnesses who swore for the Defendant. Particularly impressive is the willingness of such witnesses to do so despite the almost unparalleled publicity in the community which attended the case, and the nature of the charges.

Is it the law of Alabama that a distinguished citizen, having a general reputation of unimpeachable integrity in pub-

lic and private life is to be made a felon by the testimony of one ex-convict? The case law says not. *Melton v. State*, supra; *Gilbert v. State*, supra; authorities cited, Proposition of Law 56, Proposition of Law 57. The jury, because of the scattergun mode of attack by the prosecution, both pre-trial by multiple indictments, and during trial, answered in the affirmative. The trial judge answered in the affirmative. This Court will decide the issue.

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Limitations of space foreclose arguing the remaining grounds of the motion for new trial. Most relate to rulings on pleadings, and errors preserved by objections to evidence, and motions, and Defendant respectfully insists on same.

IX

Defendant presses upon this Court that the overall conduct of his trial was made so devoid of fundamental fairness by the atmosphere of the trial itself, the admission of illegal evidence, the hostile attitude of the trial judge, the misconduct of the Attorney General and of the Madison County District Attorney, and the conviction by the jury without legal evidence to support the charge, that it violated the Defendant's rights under the Fourteenth Amendment to the Constitution of the United States, and under the Constitution of Alabama 1901, to due process of law, and that to uphold the conviction in this case would be to impose involuntary servitude on him in violation of the Thirteenth Amendment to the Constitution of the United States. It has long been held that it is a violation of the due process clause of the Fourteenth Amendment to the United States Constitution to convict and to punish a person without evidence of his guilt (see authorities cited, Proposition of Law 27), and this rule applies to cases in which there is no evidence

of one or more essential elements of the crime charged (see authorities cited, Proposition of Law 28). To jail a man convicted without evidence of guilt is to impose involuntary servitude, in violation of the Thirteenth Amendment to the United States Constitution (see authorities cited, Proposition 29). Such a conviction is void, and may even be questioned collaterally. *Moore v. Dempsey*, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265; *Ex Parte Nielsen*, 131 U. S. 176, 182, 33 L. Ed. 118, 120, 9 S. Ct. 672. If a citizen is convicted without evidence, the whole proceeding is not a trial in the constitutional sense, but is a mere pretense of a trial, and the conviction and sentence are wholly void. *Brown v. Mississippi*, 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461; *Blackburn v. Alabama*, 80 S. Ct. 274, 361 U. S. 199, 4 L. Ed. 2d 242.

The deficiencies in the evidence in this case have been hereinbefore argued in detail, and such argument is adopted herein by reference. (Br.pp.A-70-82)

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EXCERPTS FROM PETITIONER'S BRIEF IN COURT OF CRIMINAL APPEALS OF ALABAMA, ON PETITIONER'S APPLICATION FOR REHEARING

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PROPOSITIONS OF LAW

I-A

The offense denounced by §64, Tit. 14, of the Code of Alabama, is not consummated by the mere *offer* to accept a bribe. For there to be a violation of the statute, there must be a corrupt *acceptance*, or *agreement to accept* a bribe *under an agreement or understanding with the other person* that the act, vote, opinion, decision or judgment of the official will be influenced thereby in a matter brought, or to be brought, before the official in his official capacity.

BAREFIELD V. STATE
14 Ala. 603

U. S. V. DIETRICH
126 F. 664

PEOPLE V. COFFEY
161 Cal. 433, 39 L.R.A. (N.S.) 704, 119 P. 901

11 C.J.S., *BRIBERY*, §2c, p.843

People v. Weitzel (Cal.)
255 P. 792, 52 A.L.R. 811

State v. Bowles
70 Kan. 821, 69 L.R.A. 176, 79 P. 726

Hutchinson v. State
36 Tex. 293

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All authorities other than those above listed were cited to Appellant's Propositions of Law sections of his original Brief and Reply Brief filed on this appeal and same are incorporated herein by reference. (Br.p.1)

ARGUMENT

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With reference to the question of the sufficiency of the evidence to support the conviction, the Court has treated the indictment as charging a violation of Section 75, Title 14, of the Alabama Code (*solicitation* of a bribe), whereas defendant was charged with *accepting* or *agreeing to accept* a bribe under Section 64, Title 14, of the Alabama Code. The Court therefore ruled on this question in disregard of essential elements of the offense charged, and of material allegations of the indictment.

With respect to its ruling on the above-listed issues, the Court's decree is repugnant to numerous decisions of the Court of Appeals of Alabama, and of the Alabama Supreme Court, and, in the case of the question of the sufficiency of the evidence, to decisions of the United States Supreme Court holding that a defendant's rights under the Thirteenth and Fourteenth Amendments to the United States Constitution are violated if there is no evidence to support an element of the crime charged. (Br.p.3)

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II

Sufficiency of the Evidence to Support the Verdict

A. *To Authorize a Conviction*

This Court in its Opinion, p. 18), said:

> "The Alabama statute condemns an *offer* to accept a bribe by promise of a 'thing of value', and a conviction may be had on proof that an *offer to accept* by an accused was made in exchange for his official partiality in matters pending before him."

In the context of Section 64, Title 14, of the Alabama Code, the above-quoted statement of the Court is palpably

erroneous. Perhaps it was such view of the law that impelled the Court to hold the scanty and ambiguous testimony of Myra Braidfoot sufficient to support the conviction. The indictment does not charge the Defendant with a mere *offer* to accept a bribe, *nor does the statute under which Defendant was prosecuted make a mere offer to accept a bribe a crime.* The indictment charges, following Section 64, Title 14, of the Code, that the Defendant *accepted* or *agreed to accept* a "gift, gratuity, or other thing of value", etc., "*under an agreement or with an understanding*" that his official action would be influenced thereby in the ways *specified in the indictment.* To sustain the conviction, therefore, there must have been substantial evidence that the Defendant *accepted* or *agreed to accept* a specified consideration from the Braidfoot woman under an agreement with her that his official action would be influenced thereby. In other words, there must have been a *contract* between Defendant and Myra Braidfoot. The essence of the offense denounced by the statute is, in fact, a corrupt *agreement.* Without an *agreement*, there is no violation of the statute under which Defendant was prosecuted.

In *People v. Weitzel* (Cal.), 255 Pac. 792, 52 A.L.R. 811, the precise question was presented. In *Weitzel*, the defendant was indicted under a statute similar to that under which the Defendant here was prosecuted, and which defined the offense as *receiving* or *agreeing to receive* a bribe. The California Supreme Court, en banc, held that the defendant, who was a city councilman, had not violated the statute by merely *offering* to sell his official vote for money. The California court held that a corrupt *agreement* and a *meeting of the minds* of the parties was necessary.

In *People v. Coffey*, 161 Cal. 433, 39 L.R.A. (N.S.) 704, 119 Pac. 901, the court said:

> "The charge against this defendant, as we have seen, is under §165 of the Penal Code. It is not for asking or soliciting a bribe. It is for 'agreeing' to receive and 'receiving' a bribe. The agreement necessarily carries with it the essential concept of a criminal and corrupt bargain. There can be no agreement without a meeting of minds, and a meeting of minds for this base bargain is declared to be a crime . . . *An officer may solicit bribes, may ask for bribes, may advertise his willingness to accept bribes. Each one of these acts is a separate, distinct, and recognized crime, but no one of them is the crime of agreeing to take a bribe, which ex vi termini requires the guilty cooperation of another.*"

In *U. S. v. Dietrich*, 126 F. 664, the court held that cooperation of two persons was essential to constitute an *agreement* to receive, or the receiving of a bribe, saying:

> "A person cannot agree with himself, receive from himself, or give to himself. The concurrent and several acts of two persons are necessary to the act of agreeing, receiving or giving. In this respect, agreeing to receive a bribe from another and agreeing to give one are unlike soliciting or offering a bribe, because the solicitation or offer may be the act of a single person and may occur without any concurrent act of another."

In *State v. Bowles*, 70 Kan. 821, 69 L.R.A. 176, 79 Pac. 726, it was held that mere *solicitation* of a bribe did not even constitute an attempt to commit the offense of receiving or agreeing to receive a bribe. In *Bowles*, the court said:

> "So long as the will of the person solicited is opposed to the corrupt conduct, there can be no attempt, in the legal sense, to accept or receive a bribe. After a willingness of mind on the part of both participants has been established, the matter of giving and receiving

> the bribe money or other pecuniary or personal advantage must still be accomplished."

In *Hutchinson v. State*, 36 Tex. 293, where the prosecution relied upon a statute which made the *accepting* of a bribe an offense, offering to receive a bribe was held to be no offense.

In *Barefield v. State*, 14 Ala. 603, wherein defendant was charged under a statute making it a crime to corruptly *promise* a bribe, the Alabama Supreme Court, through Justice Dargan, said:

> ". . . A mere offer, which is rejected, does not constitute a promise, or gift, under the statute . . . *but we cannot come to the conclusion that the statute intended to punish by imprisonment in the penitentiary the mere offer to bribe.* To perfect a crime, there must be an acceptance of the promise, or gift, either express or implied. But if the bribe is rejected, the offense is punishable at the common law, by fine and imprisonment."

In 11 C.J.S., *Bribery*, Section 2*c*, p.843, it is said:

> "Where a statute defines the offense of bribery by an officer to be the act of *agreeing* to receive a bribe, a mere offer by an official to accept a bribe from another, unaccompanied by the agreement of the person solicited is not criminal."

Appellant was not charged with solicitation of a bribe, which was a common law offense, and also made a crime under Section 75, Title 14, of the Alabama Code. This Court has treated the issue of the sufficiency of the evidence as if the Appellant had been indicted under the last cited statute!

This Court held in this case that the testimony of Myra Braidfoot that the Defendant asked her if she "could meet him at the Kings Inn at 10:00;" that he put his arm around her waist; that he told her that if she "met him at Kings Inn we could talk about the situation and maybe take care of it;" that she "told him that I would;" and that, instead of meeting the Defendant, she returned directly to Decatur, Alabama, made a case for the jury, despite the exculpatory testimony of Defendant, and despite the fact that Braidfoot was a convicted felon, and that there exists a violent presumption of law against the truthfulness of such a person under oath. The Court has therefore held that such testimony, taken in connection with the "pattern testimony" of the other female witnesses for the State, was *substantial* evidence (required by numerous appellate court decisions in this State) that the following elements of the offense charged and material allegations of the indictment were true:

1. Defendant corruptly *accepted* or *agreed to accept* "sexual intercourse, or the promise of sexual intercourse, or the promise of other sexual favors or relationship" from Myra Braidfoot.

2. The *acceptance* or *agreement to accept* "sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship" from Myra Braidfoot was *under "an agreement or with an understanding"* with Myra Braidfoot that Defendant would "dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, reduce or cause to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of," the criminal prosecution then pending against Myra Braidfoot.

The only "agreement" the Witness Braidfoot testified to between her and Defendant was that she would meet him at the Kings Inn at 10:00 a.m. in the morning. Her own testimony establishes that she had no such intent. She said that she was "paranoid" (Tr.p.187) at the suggestion and that she immediately returned to Decatur and reported the

incident to her lawyer (Tr.p.187). Irrespective of any corrupt *intent* on Defendant's part, such was not an *acceptance* or *agreement to accept* by Defendant from Braidfoot of "sexual intercourse, the promise of sexual intercourse", etc. *as alleged in the indictment.* There was not, as alleged in the indictment, an *agreement*, or *understanding* between Defendant and Braidfoot that Defendant would "dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed", etc. the criminal prosecution then pending against Braidfoot, in consideration of "sexual intercourse, the promise of sexual intercourse", etc. As to such elements of the State's cause of action there was a total absence of evidence. Appellant, for emphasis, because the Court apparently overlooked extensive argument in Appellant's briefs on this point, addresses the following questions to this Honorable Court:

1. *Where* is there evidence that Defendant accepted or agreed to accept "sexual intercourse, the promise of sexual intercourse . . .", etc. from Myra Braidfoot, who did not, expressly or impliedly, offer Defendant any of such things, by her own testimony?

2. *Where* is there evidence that there was an "agreement" or "understanding" between Defendant and Myra Braidfoot that Defendant, in consideration of "sexual intercourse, the promise of sexual intercourse . . .", etc., would "dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, . . ." etc.

The above questions are addressed to this Court upon the assumption that the evidence of "similar transactions" was properly admitted and that the jury would be entitled to infer corrupt intent from all of the evidence, legal and illegal. However — again assuming the admissibility of the evidence of "similar transactions" — evidence of similar offenses and transactions cannot supply the corpus delicti,

which must first be established by other evidence directly bearing upon the offense charged. *Crow v. State*, 28 Ala. App. 319, 183 So. 897. The corpus delicti therefore rests solely upon the Braidfoot testimony. It was not established.

B. *On Motion for New Trial*

This Court made no mention in its Opinion of the Defendant's Assignment of Error No. 37, relating to the action of the trial court in overruling the Defendant's motion for new trial upon the grounds that the verdict was not supported by the legal evidence, or by the measure of proof required by law, and as being contrary to the preponderance of the evidence. Unless its Opinion is extended on rehearing, Appellant is therefore foreclosed on such issue on any further review.

The gist of Appellant's contention in such respect is that the evidence against Defendant was insufficient to authorize a reasonable inference of the guilt of the accused, and, therefore, even if there was sufficient evidence for the trial court to properly allow the case to go to the jury, it erred in denying Appellant's motion for new trial. This is a serious contention, and is based upon the following principles:

1. A jury may not arbitrarily disregard a defendant's testimony and refuse to consider it. *Watts v. State*, 19 Ala. App. 549, 98 So. 914; *Melton v. State*, 26 Ala. App. 265, 158 So. 196; *Ammons v. State*, 20 Ala. App. 283, 101 So. 511; *McHugh v. State*, 30 Ala. App. 231, 3 So. 2d 569.

2. A conviction cannot be based on the uncorroborated testimony of a single witness if his testimony is so indefinite, contradictory or unreliable that it would be unsafe to rest a conviction thereof. *Melton v. State*, supra; *Gilbert v. State*, 21 Ala. App. 672, 107 So. 925; *Gilbert v. State*, 20 Ala. App. 565, 104 So. 45.

In *Melton*, cited supra, the Court of Appeals held that "if the only evidence *connecting* the accused with the crime charged consists of the testimony of the prosecuting witness only, and the character of the prosecuting witness for veracity is impeached, it is error for the trial court to deny a new trial." The Witness Braidfoot was impeached as a matter of law by evidence of three forgery convictions and one larceny conviction.

The only witness who testified against Defendant on the material allegations of the indictment was Myra Braidfoot. A legal presumption existed against her truthfulness. In fact, the appellate courts of this State have held that there is "a violent presumption" against the truthfulness under oath of a person who has been convicted of an infamous crime. *Smith v. State*, 129 Ala. 89, 29 So. 699; *Sylvester v. State*, 71 Ala. 17; *Taylor v. State*, 62 Ala. 164. On the other hand, even as a defendant, a legal presumption exists in favor of the truth of a defendant's testimony until the presumption is rebutted by legal evidence.

C. *Insufficiency of the Evidence as a Deprivation of Constitutional Guaranties*

Appellant has previously pointed out in this brief that there was not merely insufficient evidence to authorize a reasonable inference by the jury of the existence of certain elements of the crime charged, but there was a complete lack of evidence. It has long been held that it is a violation of the due process clause of the Fourteenth Amendment to the United States Constitution to convict and punish a person without evidence of his guilt, and this rule applies to cases in which there is no evidence of one or more essential elements of the crime charged. *Garner v. Louisiana*, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207; *Gregory v. Chicago*, 394 U. S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946; *Taylor v.*

Louisiana, 370 U. S. 154, 8 L. Ed. 2d 395, 82 S. Ct. 1188, reh. den. 370 U. S. 965, 8 L. Ed. 2d 834, 82 S. Ct. 1578; *Mauldin v. State*, 28 Ala. App. 30, 177 So. 309. See other cases cited to Propositions of Law 27 and 28, Appellant's original brief. To jail a man convicted without evidence of guilt is to impose involuntary servitude, in violation of the Thirteenth Amendment to the United States Constitution. *Caminito v. Murphy* (C. A. 2, N. Y.) 222 F. 2d 698, cert. den. 350 U. S. 896, 100 L. Ed. 788, 76 S. Ct. 155. Such a conviction is void and may be questioned collaterally. *Moore v. Dempsey*, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265; *Ex Parte Nielson*, 131 U. S. 176, 182, 33 L. Ed. 118, 120, 9 S. Ct. 672; *Brown v. Mississippi*, 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461; *Blackburn v. Alabama*, 80 S. Ct. 274, 361 U. S. 199, 4 L. Ed. 2d 242.

Further, with the exception of inferences of corrupt intent which might be drawn from the Braidfoot testimony, there was no other legal evidence bearing upon such issue. The "similar transaction" evidence was inadmissible, and, even if admissible, most of such testimony was from the mouths of convicted felons who expected, and received, rewards for their testimony from the State — none of which appears in this Honorable Court's Opinion. (Br.pp.4-12)

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It has heretofore been shown that the Braidfoot testimony alone does not establish the corpus delicti of the offense charged. Proof of an offense of the same nature as that charged cannot be used to establish the corpus delicti of the crime charged in the indictment. *Crow v. State*, 28 Ala. App. 319, 183 So. 897; *People v. Whiteman*, 114 Cal. 338, 46 Pac. 99 (cited in *Crow v. State, supra*). (Br.p.17)

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E. *Constitutional Grounds*

In Section II of this Brief, Appellant has again pressed upon this Court that there was *no* evidence to support certain elements of the crime charged, and, therefore, Defendant was convicted in violation of the Fourteenth and Thirteenth Amendments to the United States Constitution. Appellant further points to the cumulative prejudicial effect of the overall conduct of the trial, taken in conjunction with the sensational nature of the charges, the multiple charges, the patent bias and hostility which the trial judge displayed toward the Defendant and his counsel in the presence of the jury, the misconduct of the Attorney General and the Madison County District Attorney in the presence of the jury, and the reception over objection of a great deal of illegal and prejudicial evidence, all of which deprive Defendant of his right under the Fourteenth Amendment to the United States Constitution and under Alabama Constitution to due process of law. (Br.p.26)

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VI

Conclusion

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The testimony of the one witness (Braidfoot) who could testify to the corpus delicti of the crime charged was ambiguous and omitted elements of the offense. As a convicted felon, there was a legal presumption against the truth of her testimony. There was no corroboration of her testimony. The minds of the jury were poisoned against Defendant before trial and during trial, particularly by the so-called evidence of "similar transactions." Even accepting the testimony of the other female witnesses at face value, and rejecting the Defendant's testimony in contradiction

thereof, it was not established by direct testimony that in any such instance the Defendant would have violated §64, Title 14, of the Alabama Code. A finding that in any of such instances he did violate the cited statute would rest on inference. A jury is not allowed to rest an inference of the existence of an element of the crime charged upon another inference. *Carr v. State*, 28 Ala. App. 466, 187 So. 252; 7A Sou. Dig., *Criminal Law*, Key Number 306; 12 Sou. Dig., *Evidence*, Key Number 54.

If this conviction stands, this Court will have placed the careers and the liberty of the Judges of this State at the mercy of any disgruntled criminal, or criminal who seeks a "deal," who can obtain the ear of a prosecuting attorney. (Br.pp.27-28)

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EXCERPTS FROM PETITIONER'S BRIEF IN SUPPORT OF HIS PETITION FILED IN THE SUPREME COURT OF ALABAMA FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

PROPOSITIONS OF LAW

* * *

10

Where the Court of Appeals does not render an opinion, review by the Supreme Court cannot ordinarily be undertaken; however, where the question as to the correctness of the judgment of the Court of Appeals is primarily a federal question, the question must be determined from the whole record on petition for certiorari, irrespective of the fact that the Court of Appeals did not write an opinion.

DILLARD V. STATE (1968)
283 Ala. 245, 215 So. 2d 464

CLEMONS V. CITY OF BIRMINGHAM
277 Ala. 447, 171 So. 2d 456

STATE V. PARRISH
242 Ala. 7, 5 So. 2d 828

BROWN V. STATE (1965)
277 Ala. 353, 170 So. 2d 504

Wright v. State
279 Ala. 84, 181 So. 2d 898

Early v. State (1966)
280 Ala. 281, 192 So. 2d 734

Gandy v. State
276 Ala. 409, 162 So. 2d 620 (Br.pp.7-8)

11

In dealing with the question of whether or not there was any evidence to prove an essential element of the crime

charged, the Supreme Court, on certiorari to the lower appellate court, is not reviewing the sufficiency of the evidence, but is reviewing the question of whether the conviction rests upon any evidence at all of that element of the crime, for it is a violation of the Fourteenth Amendment to the United States Constitution to convict and punish a person without any evidence of his guilt.

Clemons v. City of Birmingham
277 Ala. 447, 171 So. 2d 456 (Br.p.8)

* * *

13

It is settled in this State that in a criminal prosecution the State must prove beyond a reasonable doubt the crime charged, and if the proof fails to establish the essential elements necessary to constitute the crime for which the accused is on trial, he is entitled to an acquittal.

Clemons v. City of Birmingham
277 Ala. 447, 171 So. 2d 456

Benefield v. State
286 Ala. 722, 246 So. 2d 483

Roberson v. State
183 Ala. 43, 62 So. 837 (Br.pp.8-9)

* * *

15

The offense denounced by §64, Tit. 14, of the Code of Alabama, is not consummated by the mere *offer* to accept a bribe. For there to be a violation of the statute, there must be a corrupt *acceptance*, or *agreement to accept* a bribe *under an agreement or understanding with the other person* that the act, vote, opinion, decision or judgment of the official will be influenced thereby in a matter brought, or to be brought, before the official in his official capacity.

BAREFIELD V. STATE
14 Ala. 603

U. S. V. DIETRICH
126 F. 664

PEOPLE V. COFFEY
161 Cal. 433, 39 L.R.A. (N.S.) 704, 119 P. 901

11 C.J.S., *BRIBERY*, §2*c*, p. 843

People v. Weitzel (Cal.)
255 P. 792, 52 A.L.R. 811

State v. Bowles
70 Kan. 821, 69 L.R.A. 176, 79 P. 726

Hutchinson v. State
36 Tex. 293 (Br.pp.9-10)

* * *

22

It is a violation of the due process clause of the Fourteenth Amendment to the United States Constitution to convict and punish a person without any evidence of his guilt.

CLEMONS V. CITY OF BIRMINGHAM
277 Ala. 447, 171 So. 2d 456

FREDERICK V. STATE (1924)
20 Ala. App. 336, 102 So. 146, cert. den.
Ex Parte State Ex Rel. Attorney General,
212 Ala. 158, 102 So. 147

THOMPSON V. CITY OF LOUISVILLE (1960)
362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 624

GREGORY V. CHICAGO
394 U. S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946

Garner v. Louisiana
368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207

Anno. 80 A.L.R. 2d, 1362-1376

Anno. 15 L. Ed. 2d, 889-898

Barr v. Columbia (1964)
278 U. S. 146, 12 L. Ed. 2d 766, 84 S. Ct. 1734

21 Am. Jur. 2d, *Criminal Law*, §226, p.265

16 C.J.S., *Constitutional Law*, §589, p.1182 (Br.p.14)

23

A state court conviction in which there is no evidence of one or more constituent or essential elements of the crime charged is so totally devoid of evidentiary support as to constitute a denial of due process and thereby violate the Fourteenth Amendment to the Constitution of the United States.

MAULDIN V. STATE (1937)
28 Ala. App. 30, 177 So. 309

SHUTTLESWORTH V. BIRMINGHAM (1965)
382 U. S. 87, 15 L. Ed. 2d 176, 86 S. Ct. 211

THOMPSON V. CITY OF LOUISVILLE (1960)
362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654

JOHNSON V. FLORIDA (1968)
391 U. S. 596, 20 L. Ed. 2d 838, 88 S. Ct. 1713

Taylor v. Louisiana (1962)
370 U. S. 154, 8 L. Ed. 2d 395, 82 S. Ct. 1188,
reh. den. 370 U. S. 965, 8 L. Ed. 2d 834, 82 S. Ct. 1578

Anno. 80 A.L.R. 2d, pp.1362-1376

Anno. 15 L. Ed. 2d, 889-898

Brown v. Louisiana (1966)
383 U. S. 131, 15 L. Ed. 2d 637, 86 S. Ct. 719

U. S. Ex Rel. Mallory v. Myers (1964, D. C. Pa.)
240 F. Supp. 373, affd. (CA 3) 343 F. 2d 912, cert. den.
381 U. S. 943, 14 L. Ed. 2d 706, 85 S. Ct. 1781

U. S. Ex Rel DeMoss v. Pennsylvania (1963, C. A Pa.)
316 F. 2d 841, cert. den. 375 U. S. 859, 11 L. Ed. 2d
85, 84 S. Ct. 123 (Br.p.15)

24

To jail a man convicted without evidence of guilt is to impose involuntary servitude, in violation of the Thirteenth Amendment to the Constitution of the United States.

Caminito v. Murphy (1955, CA 2 N.Y.)
222 F. 2d 698, cert. den. 350 U. S. 896, 100 L. Ed. 788, 76 S. Ct. 155 (Br.pp.15-16)

25

If the court which renders a judgment does not have jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and the court does not have jurisdiction to sentence a prisoner when a judgment against him is obtained in violation of a constitutional right, and in such case habeas corpus is available to the prisoner to obtain his freedom.

Ex Parte Nielsen (1889)
131 U. S. 176, 182, 33 L. Ed. 118, 120, 9 S. Ct. 672

Moore v. Dempsey
261 U.S. 86, 67 L. Ed. 543, 43 S. Ct. 265 (Br.p.16)

26

If an accused is deprived of a fundamental constitutional right in his trial, the whole proceeding is a mere pretense of a trial, and the conviction and sentence are wholly void.

Brown v. Mississippi
297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461

Blackburn v. Alabama (1960)
80 S. Ct. 264, 361 U. S. 199, 4 L. Ed. 2d 242 (Br.p.16)

27

In a prosecution for a particular offense, evidence tending to show the defendant's guilt of another and distinct offense, though of the same nature as the one charged in the indictment, or that he was concerned in other and different transactions disconnected with the crime charged, is generally inadmissible. A strict adherence to this rule is necessary to prevent criminal prosecutions from becoming instruments of oppression and injustice.

GASSENHEIMER V. STATE
52 Ala. 313

BRASHER V. STATE
249 Ala. 96, 30 So. 2d 31

MASON V. STATE
259 Ala. 438, 66 So. 2d 557

NOBLE V. STATE
253 Ala. 519, 45 So. 2d 859

State v. Crowley
13 Ala. 172

Gray v. State
160 Ala. 107, 49 So. 678

Crow v. State
28 Ala. App. 319, 183 So. 897

Dennison v. State
17 Ala. App. 674, 88 So. 211

Van Nostrand v. State (1973)
51 Ala. App. 494, 286 So. 2d 903, cert. den. 291 Ala. 799, 286 So. 2d 906

Weatherspoon v. State
36 Ala. App. 392, 56 So. 2d 793

Browning v. State
31 Ala. App. 137, 13 So. 2d 54, 56

Wilbanks v. State
266 So. 2d 623

McMurtrey v. State
37 Ala. App. 656, 74 So. 2d 528 (Br.pp.16-17)

* * *

ARGUMENT

I

THE EVIDENCE

Assignments of Error numbered I, II, III, IV, XI, XIV, and XV are related, and will be argued together.

This Court has held many times that it will not review the "sufficiency of the evidence" on certiorari to a lower appellate court, as such involves a question of fact, and not of law. However, it is held that, in dealing with the question of whether or not there was *any* legal evidence to prove an essential element of the crime charged, the Supreme Court is not reviewing the "sufficiency of the evidence," but is dealing with the question of whether the conviction rests upon any evidence at all of that element of the crime, "for it is a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States to convict a person without any evidence of his guilt." *Clemons v. City of Birmingham* (1965), 277 Ala. 447, 171 So. 2d 456, citing *Thompson v. City of Louisville*, 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654; *Garner v. Louisiana*, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207. The Alabama Supreme Court has further held that the finding of the lower court as to what the evidence in substance shows to support a conviction is conclusive on review by the Supreme Court, *but whether such finding justifies granting or refusing of the affirmative charge as a matter of law is subject to review. Brickley v. State* (1970), 286 Ala. 546, 243

So. 2d 502; *Clark v. State*, 257 Ala. 95, 57 So. 2d 384; *Rainey v. State*, 245 Ala. 458, 17 So. 2d 687; *Kozlowski v. State*, 248 Ala. 304, 27 So. 2d 818.

In *Kozlowski v. State*, supra, the Supreme Court held that, on appeal to the Court of Appeals from a manslaughter conviction, the Court of Appeals could only decide whether the jury acted reasonably in inferring from the evidence that the corpus delicti did exist, and therefore the Supreme Court, in reviewing the finding of the Court of Appeals that certain evidence recited in the Opinion of the Court of Appeals was not sufficient basis for the jury's finding that the corpus delicti existed, was not reviewing any factual finding by the Court of Appeals, nor its judgment on the *weight* of the evidence. In the recent case of *Benefield v. State* (1971), 286 Ala. 722, 246 So. 2d 483, the Supreme Court held that a decision by the Court of Criminal Appeals which erroneously supported a finding by the jury of the existence of the corpus delicti, is a decision "that is in conflict with a prior decision of the Supreme Court on the same point of law (Supreme Court Rule 39), and is reviewable on petition for certiorari." See also *Brickley v. State* (1970), 286 Ala. 546, 243 So. 2d 502.

If the Court of Criminal Appeals quotes a substantial portion of the testimony in a case before it on appeal, as it did in this case, and which it affirms, the Supreme Court, on certiorari, will assume that the Court of Criminal Appeals included it to show that it met the legal requirements to support a conviction of the crime charged. *Benefield v. State*, 286 Ala. 722, 246 So. 2d 483; *Avondale Mills v. Burnett*, 268 Ala. 82, 106 So. 2d 885. Moreover, even in the absence of any opinion by the lower appellate court, the Supreme Court, if a federal question, and particularly a constitutional question, is involved, will review and determine the petition *from the whole record. Dillard v. State*,

283 Ala. 245, 215 So. 2d 464; *Clemons v. City of Birmingham*, 277 Ala. 447, 171 So. 2d 456; *Brown v. State*, 277 Ala. 353, 170 So. 2d 504; *State v. Parrish*, 242 Ala. 7, 5 So. 2d 828; *Early v. State*, 280 Ala. 281, 192 So. 2d 734.

Petitioner properly raised the question in the trial court of the sufficiency of the evidence to support a guilty verdict by request for the written affirmative charge and by motion for new trial. Such is not recited in the opinion of the Court of Criminal Appeals, but Petitioner presumes that, since the Court of Criminal Appeals decided the question and discussed it in its Opinion, this Court will presume that Petitioner properly reserved the question for review. Be that as it may, this Court has held in numerous cases that, where there is no dispute about the facts, the Supreme Court, on certiorari, may go to the full record for a more complete understanding of those features treated in an opinion of the Court of Criminal Appeals. *Wilbanks v. State*, 289 Ala. 171, 266 So. 2d 632, on remand, 48 Ala. App. 754, 266 So. 2d 637, cert. den. 93 S. Ct. 913, 409 U. S. 1116, 34 L. Ed. 2d 700; *Donahey v. State*, 287 Ala. 716, 255 So. 2d 599; *Brickley v. State*, 286 Ala. 546, 243 So. 2d 502; *Fowler v. State*, 261 Ala. 262, 74 So. 2d 512; *Griffin v. State*, 287 Ala. 574, 253 So. 2d 340.

Under its prior decisions, therefore, this Court has jurisdiction to review a decision of the Court of Criminal Appeals holding that there was legal evidence from which the jury could properly find Petitioner guilty under the indictment, and, if a constitutional issue exists, it will, if necessary, or appropriate, look to the entire record to determine the issue. (Br.pp.32-34)

* * *

The Court of Criminal Appeals stated in its Opinion:

> "The gift, gratuity, or other thing of value averred in the indictment was '. . . sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship from one Myra Layton Braidfoot . . .'"

Under the construction given by the Court of Criminal Appeals to the indictment, therefore, the elements of the crime charged were that the Petitioner:

1. While the judicial officer alleged, did unlawfully and corruptly *accept* or *agree to accept*, from Myra Layton Braidfoot:

A. Sexual intercourse, or

B. The promise of sexual intercourse, or

C. The promise of other sexual favors or relationship with Myra Braidfoot under an *agreement* or *understanding* with her that Petitioner, *in his official capacity*, would:

2. "Dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed . . . ," etc., the criminal prosecution then pending (and specified in the indictment) against Myra Braidfoot in the Madison County Court.

The evidence relied upon by the State to satisfy the jury beyond a reasonable doubt and to a moral certainty of the existence and truth of the above listed elements of the crime charged, and of the material allegations of the indictment, consisted solely of the testimony of Myra Braidfoot, and of any inferences of corrupt intent which the jury might be entitled to draw from the testimony of the female State Witnesses Gwathney, Forsythe, Blann and "Anonymous" relative to so-called "similar transactions" they had allegedly had with Petitioner on other occasions than those covered by the indictment.

It is fundamental and elementary that the corpus delicti of a crime consists of *substantial* evidence of each of the elements of the crime charged. *Ex Parte Grimmett*, 228 Ala. 1, 152 So. 263; *Lang v. State*, 252 Ala. 640, 42 So. 2d

512; *Ellison v. State*, 254 Ala. 428, 48 So. 2d 176; *Massengale v. State*, 36 Ala. App. 195, 54 So. 2d 85; *White v. State*, 37 Ala. App. 424, 69 So. 2d 874. To authorize submission of a criminal case to the jury, a mere scintilla of evidence, in view of the presumption of innocence, is insufficient. *Massengale v. State, supra*; *White v. State*, 37 Ala. App. 424, 69 So. 2d 874; *Lang v. State, supra.*

The corpus delicti of the crime charged cannot be established in the first instance by proof that the accused committed another offense of the same nature as that charged. *Crow v. State*, 28 Ala. App. 319, 183 So. 897; *People v. Whiteman*, 114 Cal. 338, 56 P. 99. In fact, before evidence of distinct and independent offenses than that charged is admissible, the corpus delicti must first be established, and a prima facie case made against the accused that he committed the crime charged. *Crow v. State*, supra; *People v. Whiteman*, supra.

The Court of Criminal Appeals, in support of its decision that the evidence was sufficient to support a conviction, said in its Opinion:

> "To constitute an offer to accept a bribe, the thing solicited must be value and may be some act. *Caruthers v. State*, supra.
>
> The Alabama statute condemns an offer to accept a bribe by promise of a "thing of value", and a conviction may be had on proof that an offer to accept by an accused was made in exchange for his official partiality in matters pending before him.
>
> Although the evidence before the jury was in dispute, it could be inferred from this statement in Braidfoot's testimony, "if I met him at the Kings Inn we could talk about the situation and maybe take care of it," appellant was asking for a "thing of value" or an "act beneficial to" himself."

In other words, the question of whether the corpus delicti, and all of the material allegations of the indictment, were established, turns over one sentence from the testimony of Myra Braidfoot, given over two years after the incident charged in the indictment, viz:

> "He said if I met him at Kings Inn we could talk about the situation and maybe take care of it." (Opinion, p. 4)

The question of whether Petitioner shall serve three years in the penitentiary as a convicted felon and be forever barred from his profession turns over whether this Court holds, as did the Court of Criminal Appeals, that from the above quoted sentence from the testimony of Myra Braidfoot, a convicted felon and petit thief, the jury was entitled to reasonably infer that Petitioner and Myra Braidfoot entered into an *agreement* that:

1. Petitioner would "dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed . . . ," etc., the criminal prosecution then pending against her in the Madison County Court, and, in return, that:

2. Myra Braidfoot would "do an act beneficial" to the Petitioner in the form of "sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship."

Petitioner would inquire of this Court, as he did of the Court of Criminal Appeals: *Where*, from Braidfoot's testimony, is there *substantial* evidence, or, for that matter, *any* evidence, that Petitioner and Braidfoot entered into the *agreement* alleged? The truth of such material allegation and element of the offense charged would have to be inferred, if found to exist, from Braidfoot's statement that Petitioner said, "We could talk about the *situation* and *maybe* take care of it." The alleged promise of Myra Braid-

foot to Petitioner, as her part of the alleged corrupt agreement, would have to be inferred from the words "if I met him at Kings Inn." The meeting at the Kings Inn, according to Braidfoot, was to be at 10:00 o'clock a.m., directly after the session of court was concluded. A promise to meet Petitioner "at Kings Inn" is not a promise of "sexual intercourse", nor is it a promise of "other sexual favors or relationship." The alleged statement of Petitioner that "we could talk about the situation and maybe take care of it" falls far short of a promise to "dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed" Myra Braidfoot's case. Yet, although Petitioner denied making the statement to Braidfoot, and although Braidfoot's testimony itself negates the allegations of the indictment, the jury, the trial judge, and the Court of Criminal Appeals have all held, either expressly as has the Court of Criminal Appeals in its Opinion, or impliedly, that a reasonable inference of the existence of such facts can be had from the quoted sentence.

A finding, *as fact*, of the existence of all of the material allegations of the indictment, including the corpus delicti, being necessarily dependent on inference only, the evidence against Petitioner was entirely circumstantial. This Court and the lower appellate courts of this State have repeatedly held that for circumstantial evidence to be sufficient to justify a jury in convicting upon it, the circumstances proved must not only be consistent with the hypothesis that the accused is guilty, but inconsistent with the hypothesis that he is innocent, and inconsistent with every rational hypothesis except that of guilt. *Benefield v. State*, 286 Ala. 722, 246 So. 2d 483; *Lang v. State*, 5 Ala. 640, 42 So. 2d 512; *Bowen v. State*, 140 Ala. 65, 37 So. 233, 234; *Handley v. State*, 38 Ala. App. 281, 83 So. 2d 722, cert. den. 263 Ala. 698, 83 So. 2d 725. It is absurd to say that the above quoted

sentence from Braidfoot's testimony is not only consistent with the hypothesis that Petitioner and Braidfoot entered into the *specific corrupt agreement* alleged in the indictment, but is inconsistent with the hypothesis that Petitioner and Braidfoot did not enter into such a corrupt agreement, and inconsistent with every other rational hypothesis. Despite such absurdity, however, the jury convicted, Petitioner was sentenced to three years on the verdict, the trial court denied Petitioner's motion for new trial, and the Court of Criminal Appeals has affirmed the conviction.

The Court of Criminal Appeals apparently realized that it was impossible to reasonably infer from the above-quoted sentence from Braidfoot's testimony that a bilateral agreement existed between Petitioner and Braidfoot. Instead, the Court of Criminal Appeals held that "a conviction may be had on proof that an *offer to accept* by an accused was made in exchange for his official partiality in matters pending before him." (Op., p.18). A mere "*offer*" to accept a bribe by promise of a thing of value is *not* a violation of §*64* of Title 14 of the Alabama Code, which specifically and expressly provides that the corrupt agreement or acceptance of a "gift, gratuity or other thing of value, etc." must be with "an agreement, or with an understanding that his act, vote, opinion, decision or judgment is to be given in any particular manner, or upon any particular side of any cause, question or proceeding, . . ."

In *People v. Weitzel* (Cal.), 255 Pac. 792, 52 A.L.R. 811, the question was presented. In *Weitzel*, the defendant was indicted under a statute similar to that under which the Defendant here was prosecuted, and which defined the offense as *receiving* or *agreeing to receive* a bribe. The California Supreme Court, en banc, held that the defendant, who was a city councilman, had not violated the statute by merely *offering* to sell his official vote for money. The Cali-

fornia court held that a corrupt *agreement* and a *meeting of the minds* of the parties was necessary.

In *People v. Coffey*, 161 Cal. 433, 39 L.R.A. (N.S.) 104, 119 Pac. 901, the court said:

> "The charge against this defendant, as we have seen, is under §165 of the Penal Code. It is not for asking or soliciting a bribe. It is for 'agreeing' to receive and 'receiving' a bribe. The agreement necessarily carries with it the essential concept of a criminal and corrupt bargain. There can be no agreement without a meeting of minds, and a meeting of minds for this base bargain is declared to be a crime . . . *An officer may solicit bribes, may ask for bribes, may advertise his willingness to accept bribes. Each one of these acts is a separate, distinct, and recognized crime, but no one of them is the crime of agreeing to take a bribe, which ex vi termini requires the guilty cooperation of another.*"

In *U. S. v. Dietrich*, 126 F. 664, the court held that cooperation of two persons was essential to constitute an agreement to receive, or the receiving of a bribe, saying:

> "A person cannot agree with himself, receive from himself, or give to himself. The concurrent and several acts of two persons are necessary to the act of agreeing, receiving or giving. In this respect, agreeing to receive a bribe from another and agreeing to give one are unlike soliciting or offering a bribe, because the solicitation or offer may be the act of a single person and may occur without any concurrent act of another."

In *State v. Bowles*, 70 Kan. 821, 69 L.R.A. 176, 79 Pac. 726, it was held that mere *solicitation* of a bribe did not even constitute an attempt to commit the offense of receiving or agreeing to receive a bribe. In *Bowles*, the court said:

> "So long as the will of the person solicited is opposed to the corrupt conduct, there can be no attempt, in the legal sense, to accept or receive a bribe. After a willingness of mind on the part of both participants has been established, the matter of giving and receiving the bribe money or other pecuniary or personal advantage must still be accomplished."

In *Hutchinson v. State*, 36 Tex. 293, where the prosecution relied upon a statute which made the *accepting* of a bribe an offense, offering to receive a bribe was held to be no offense.

In *Barefield v. State*, 14 Ala. 603, wherein defendant was charged under a statute making it a crime to corruptly *promise* a bribe, the Alabama Supreme Court, through Justice Dargan, said:

> ". . . A mere offer, which is rejected, does not constitute a promise, or gift, under the statute . . . *but we cannot come to the conclusion that the statute intended to punish by imprisonment in the penitentiary the mere offer to bribe.* To perfect a crime, there must be an acceptance of the promise, or gift, either express or implied. But if the bribe is rejected, the offense is punishable at the common law, by fine and imprisonment."

In 11 C.J.S., *Bribery*, Section 2*c*, p.843, it is said:

> "Where a statute defines the offense of bribery by an officer to be the act of *agreeing* to receive a bribe, a mere offer by an official to accept a bribe from another, unaccompanied by the agreement of the person solicited is not criminal."

Appellant was not charged with solicitation of a bribe, which was a common law offense, and also made a crime under Section 75, Title 14, of the Alabama Code. The Court has treated the issue of the sufficiency of the evidence

as if the Appellant had been indicted under the last cited statute!

The Court of Criminal Appeals cited no authority for its statement that a mere *offer* to accept a bribe is condemned by §*64* of Title 14 of the Alabama Code, unless it intended to cite *Caruthers v. State*, 74 Ala. 406, as authority. If such was intended by the Court of Criminal Appeals, the Court erred. *Caruthers* was a prosecution under §4118 of the 1876 Code of Alabama, which was the predecessor of §65 of Title 14 of the present Alabama Code, and the wording of §4118 is practically identical to that of the present §65. §65 of the present Code, and §4118 of the 1876 Code, expressly made it a crime for a person to *offer*, *promise*, or give a bribe to various officers named in the statute. The statute under which Petitioner was prosecuted does not employ the word "*offer*" or "*promise*" at all. Under §64 of Title 14, 1940 Code, it is the corrupt *agreement* of the parties, bilateral in nature, which is the gravamen of the offense. Conclusive upon the issue is the decision of the Supreme Court in *Barefield v. State*, 14 Ala. 603. In *Barefield*, defendant was charged under the following statute:

> "Every person who shall corruptly promise, or give to any executive, legislative, or judicial officer, after his election, or appointment, either before, or after he shall have been qualified, or shall have taken his seat, any gift, or gratuity whatever, with intent to influence his act, vote, opinion, decision, or judgment, on any matter, cause, or proceeding, which may be then pending, or may by law come, or be brought before him, in his official capacity, shall be punished, etc. . . ."

In *Barefield*, the Supreme Court held that a unilateral offer or promise of a bribe was not a crime under the statute, and said:

> ". . . A mere offer, which is rejected, does not constitute a promise, or gift, under the statute . . . *but we cannot come to the conclusion that the statute intended to punish by imprisonment in the penitentiary the mere offer to bribe.* To perfect a crime, there must be an acceptance of the promise, or gift, either express or implied. But if the bribe is rejected, the offense is punishable at the common law, by fine and imprisonment."

The Court of Criminal Appeals erred in holding that there was evidence to support the conviction even if its view is correct that an "*offer* to accept a bribe" is a violation of §64 of Title 14 of the Code. Irrespective of the statute, the indictment itself does not charge an "offer." The *indictment* charges an *agreement* whereby Petitioner would do specific things and Braidfoot would do specific things. It charges a corrupt contract. Such are material allegations of the indictment, whether or not they are necessary to state a crime under the statute, which they are. The material allegations of an indictment, whether or not they are necessary to state a cause of action, must be proved as alleged; otherwise, the accused is entitled to an acquittal. *Brickley v. State* (1970), 286 Ala. 546, 243 So. 2d 502; *Stone v. State*, 115 Ala. 121, 22 So. 275; *Morningstar v. State*, 52 Ala. 405; *May v. State*, 22 Ala. App. 278, 114 So. 788; *Thompson v. State*, 47 Ala. App. 28, 249 So. 2d 644; *Owens v. State*, 46 Ala. App. 591, 246 So. 2d 478.

In numerous cases, state and federal, since *Thompson v. Louisville*, 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654, 80 A.L.R. 2d 1355, was handed down by a unanimous court in 1960, it has been held that it is a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States to convict and punish a person without any evidence of his guilt. *Garner v. Louisiana*, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207; *Gregory v. Chicago*, 394 U. S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946; *Johnson v. Florida*, 391 U. S. 596, 88 S. Ct. 1713, 20 L. Ed. 2d 838;

Taylor v. Louisiana, 370 U. S. 154, 82 S. Ct. 1188, 8 L. Ed. 2d 395, reh. den. 370 U. S. 965, 82 S. Ct. 1578, 8 L. Ed. 2d 834; *Shuttlesworth v. Birmingham*, 382 U. S. 87, 86 S. Ct. 211, 15 L. Ed. 2d 176. In *Thompson v. Louisville*, supra, the defendant had been convicted of loitering and disorderly conduct by the Police Court of Louisville, Kentucky. The United States Supreme Court, on certiorari, stated the rule to be that, just as "conviction upon a charge not made would be sure denial of due process, so is it a violation of due process to convict and punish a man without evidence of his guilt," and reversed the case, pointing out that the constitutional issue presented was not one of "sufficiency of the evidence", but instead, whether the defendant's conviction rested upon any evidence at all. With respect to the charge of loitering, the Court pointed out that under the words of the loitering ordinance itself, if the evidence failed to prove *all three elements* of the loitering charge, defendant's conviction was not supported by evidence, "in which event it does not comport with due process of law."

In *Frederick v. State*, 20 Ala. App. 336, 102 So. 146, cert. den. *Ex Parte State, Ex Rel. Attorney General*, 212 Ala. 158, 102 So. 147, the Alabama Court of Appeals held, in a prosecution for possession of prohibited liquors, that the evidence was insufficient to prove conscious possession of the liquors by the defendant, and said:

> "*To convict this defendant of the unlawful possession of the liquor in question under these facts would be the usurpation of judicial authority not conferred by law.* The measure of proof necessary and the burden resting upon the state was to show by the evidence, and the evidence alone, that the defendant was guilty as charged beyond all reasonable doubt and to a moral certainty. This burden the state failed to meet, and the evidence adduced was not sufficient to overcome the presumption of innocence which attended the accused upon this trial. For illustration, had a man been foully murdered and his body found in said cane patch under the conditions detailed here, would the court sustain a verdict for murder against this defendant because of that fact alone, and without more? We think not, and, if such action were taken, the prejudicial error in so doing could not be sustained.
>
> This court has many times announced that the same rules of evidence and procedure obtained in prosecutions for a violation of the laws enacted for the suppression of the evils of intemperance, as in all other criminal prosecutions, and *until the state makes out its case by meeting the burden resting upon it*, courts or juries have no right or authority to convict, for the fundamental law of the land is that in all criminal prosecutions the accused * * * shall not be deprived of life, liberty or property, except by due process of law."

In *Mauldin v. State*, 28 Ala. App. 30, 177 So. 309, the defendant was indicted and tried for the embezzlement of hogs. The Court of Appeals found that there was no evidence tending to show any agency on the part of defendant, or that he received the hogs as the agent of the owner. Such being the case, the Court of Appeals said:

> "We have the anomalous situation of a defendant being convicted of a crime charged against him without any evidence to sustain it . . . (and) to permit this conviction to stand on the record as it appears before us would be to deny this defendant the right of due process of law, guaranteed to him by the Constitution of the United States (Amendment 14) and by the Constitution of this state (Section 6) ."

In *Clemons v. City of Birmingham*, 277 Ala. 447, 71 So. 2d 456, the Supreme Court, speaking through Justice Lawson, recognized the rule of *Thompson v. Louisville*, supra, and the same principle of the Alabama authorities preceding it, and said:

> "In dealing with the question thus presented, we are not concerned with the sufficiency of the evidence, but with the question as to whether Clemons' conviction rests upon any evidence at all, for it is a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States to convict and punish a person without any evidence of his guilt — Thompson vs. City of Louisville, 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654; Garner vs. Louisiana, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207."

In *Clemons*, supra, the Supreme Court tacitly recognized that if only *one* of the essential elements of the offense for which appellant was convicted was not proved by some evidence, there would be a deprivation of due process of law.

Petitioner's conviction is based upon surmise, conjecture, and speculation. He was deprived of due process of law if there was no evidence to support *one* element of the crime charged, for, obviously, if only one element of an offense is non-existent, although all other elements do exist, an essential ingredient of the crime is not present, and no crime has been committed, just as no crime has been committed if *no* element of the alleged crime exists. In legal contemplation, Petitioner has not had a trial — only a pretense of a trial. His conviction is void, and, if he is confined to the penitentiary, he will, in both legal contemplation and in practical application, have been unlawfully reduced to slavery as punishment for a crime which did not occur. *Caminito v. Murphy* (1955, C.A. 2 N.Y.) 222 F. 2d 698, cert. den. 350 U. S. 896, 76 S. Ct. 155, 100 L. Ed. 788. (Br.pp.36-48)

• • •

IV

CONCLUSION

All of the points and issues argued in this Brief were argued in briefs, with citations of authority, on submission of

the appeal in the lower appellate court, and on application for rehearing. The issues were raised in the trial court and reserved for review in every possible way, including motion for new trial. Petitioner's efforts to this date have been consistently unsuccessful, although the writer does not view any of the legal questions raised by his Petition for Certiorari as involving mere legal niceties or close questions. Petitioner has spoken, but, through ineptness of counsel or otherwise, he has not yet been heard.

Petitioner was supposedly charged with accepting or agreeing to accept a bribe. He was not charged with making advances to women, or with having sexual encounters with women, but it is nevertheless clear from the whole record that he was convicted of the latter upon the pretext of a trial for the former. Not even Braidfoot, the prosecuting witness — and she had a great deal to gain by cooperating with the prosecution, as did the other female witnesses — testified to facts which made out a prima facie case under the indictment. Such was noted by Justice Bo[illegible]kout in his dissenting opinion on Petitioner's application for rehearing. If "justice" means justice *under the law*, this case, to date, has been a travesty of justice. As was said by the United States Supreme Court in *Thompson v. City of Louisville*, supra:

> "Just as conviction upon a charge not made would be a sheer denial of due process, so is it a violation of due process to convict and punish a man without evidence of his guilt."

And as the Alabama Court of Appeals has said:

> "Care should always be taken not to convict an accused of one alleged crime because (he may have been) guilty of another." *McCary v. State*, 39 Ala. App. 642, 107 So. 2d 903, cert. den. 268 Ala. 697, 107 So. 2d 906.

This Honorable Court should grant the writ prayed. It is unconscionable that the conviction in this case shall stand. (Br.pp.80-81)

CODE OF ALABAMA 1940, TITLE 14, SEC. 63

Any person who corruptly offers, promises, or gives to any executive, legislative or judicial officer, or municipal officer or to any deputy clerk, agent, or servant of such executive, legislative, judicial, or municipal officer after his election, appointment, employment, either before or after he has been qualified, any gift, gratuity, or thing of value, with intent to influence his act, vote, opinion, decision or judgment, on any cause, matter, or proceeding, which may be then pending, or which may be by law brought before him in his official capacity, shall on conviction be imprisoned in the penitentiary for not less than two years nor more than ten years.

TITLE 14, SECTION 75, CODE OF ALABAMA 1940 (RECOMPILED 1958)

Every juror, referee, arbitrator, appraiser, assessor, or other person authorized by law to hear or determine any question, matter, cause, controversy or proceeding, who asks, receives, or agrees to receive any money, property, or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, action, judgment or decision shall be influenced thereby, in any case or in any manner not hereinbefore provided for, shall be punished, on conviction, by imprisonment in the state penitentiary for not more than ten years, or by fine of not more than five thousand dollars, or by both.

Supreme Court, U. S.
FILED
MAR 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1885

THOMAS D. McDONALD,
PETITIONER

VERSUS

STATE OF ALABAMA,
RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA AND APPENDIX

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BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming the petitioner's conviction is reported as follows:

McDonald v. State 57 Ala. App. ——, 329 So 2d 583 (1975)

The order of the Supreme Court of Alabama quashing, as improvidently issued, the writ of certiorari issued to re-

view the opinion of the Court of Criminal Appeals of Alabama is reported as follows:

McDonald v. State, 295 Ala. ——, 329 So. 2d 596 (1976)

JURISDICTION

The petitioner seeks the writ under Title 28 United States Code, Section 1257(3).

QUESTION PRESENTED

Was there any evidence to support the Petitioner's conviction for bribery?

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is making his claim under the Fourteenth Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

The petitioner was convicted under Title 14, Section 64, Code of Alabama, 1940, which reads as follows:

> ". . . Any legislative, executive or judicial officer or any deputy officer, or the clerk, agent or employee of any such legislative, executive or judicial officer who corruptly accepts or agrees to accept any gift, gratuity, or any other thing of value, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his act, vote, opinion, decision, or judgment is to be given in any particular manner, or upon any particular side of any cause, question, or proceeding, which is pending or may be by law brought before him in his official capacity: Or that he is to make any particular appointment in his official capacity, shall, on conviction, be imprisoned in the penitentiary for not less than two years nor more than ten years."

STATEMENT OF THE CASE

The petitioner was indicted under Title 14, Section 64, of the Code of Alabama for bribery. The count under which he was ultimately convicted is extensive and is submitted as an Appendix to this brief. The indictment charged that the petitioner, a Judge, did "accept or agree to accept" sexual favors from one Myra Layton Braidfoot, a woman, with the understanding that he would favorably dispose of a Grand Larceny charge then pending against Mrs. Braidfoot before the petitioner's court. (R. p. 2)

On the trial of the case, Mrs. Braidfoot testified that on three occasions she was asked into his chambers by the Petitioner. On each of these occasions the petitioner commented on how attractive she was, and on the third occasion the following occurred:

> "Q. What happened the third time, please ma'am?
>
> "A. Well, we were in his Chambers again, and as we were getting up to leave he asked me if I could meet him at Kings Inn at 10:00.

"THE COURT: Asked you what?

"A. If I could meet him at Kings Inn at 10:00.

"Q. The Defendant asked her if she could meet him at the Kings Inn at 10:00.

"THE COURT: All right. I'm just a little hard of hearing.

"Q. Did he touch you or anything that time, squeeze you?

"A. He put his arm around my waist.

"Q. This Defendant, Thomas McDonald?

"A. Yes, sir.

"Q. And were you alone in his office?

"A. Yes, sir.

"Q. And what again did he say now, other than meeting at the Kings Inn?

"A. He said if I met him at Kings Inn we could talk about the situation and maybe take care of it.

"Q. Of the case?

"A. Yes, sir.

"Q. All right. If you met him at the Kings Inn at 10:00, what did you tell him?

"A. I told him that I would.

"Q. What, if anything, did you do then?

"A. I left Huntsville and went to Decatur to my attorney Ralph Slate and told him of the situation." (R. pp. 186 and 187)

On hearing Mrs. Braidfoot's report, the attorney arranged to have the case transfered out of the Petitioner's court. The attorney accomplished this by waiving preliminary hearing before the petitioner.[1] (R. pp. 181-189, 586-587 and 590-591)

Other witnesses were presented by the State to show that the incident with Mrs. Braidfoot was a part of a recurring pattern in which female defendants in the petitioner's court were approached with nearly identical language, and subsequently met the petitioner clandestinely and had sexual relations with him and, as a result, had their cases or cases in which they were interested disposed of in a most favorable manner. (R. pp. 241-259 and 423-439)

Other witnesses obtained favorable results after the petitioner kissed and fondled them. To one witness the petitioner offered a motel room key with the suggestion that she meet him there. In return, the petitioner indicated that he would not only help the witness with her long list of forgery charges but would be available to help the witness'

---

[1] Since felony charges in Alabama must be brought by indictment, there is probably no U. S. Constitutional right to a preliminary or probable cause hearing in Alabama. See **Ex parte Campbell** (278 Ala. 114, 176 So. 2d 242 [1965]) **Campbell** was cited with approval in **Coleman v. Alabama** (399 U.S. 1, 8, 26 L. Ed 2d 387, 396, 90 S. Ct. 1999 [1969]) See also **Gerstein v. Pugh,** (____U.S.____, 42 L. Ed 2d 54, 70, 95 S. Ct.____[1975]) However, the right to a preliminary hearing is a valuable statutory right in unindicted arrestees. See **State v. Bush,** (12 Ala. App 309, 68 So 492 [1915] and **Fletcher v. State,** (52 Ala. App. 303, 291 So 2d 757 [1973].

friends with bail bond reduction, etc.[2] (R. pp. 442-444 and 447-455).

The petitioner denied everything except meeting the witnesses in his chambers and discussing their cases. (R. pp. 901-1177)

Following a guilty verdict and judgment of conviction the petitioner was sentenced to three (3) years imprisonment (R. pp. 1499).

On appeal, the Court of Criminal Appeals of Alabama, found that there was sufficient evidence to support a verdict that the petitioner agreed to accept sexual favors from Mrs. Braidfoot in return for a favorable disposition of her case. *McDonald v. State*, 57 Ala. App ——, 329 So 2d 583 (1975).

The Supreme Court of Alabama issued a writ of Certiorari to review the Court of Appeals decision but quashed the writ on April 9, 1976.[3] *McDonald v. State*, 295 Ala. ——, 329 So. 2d 596 (1976).

The petition was docketed in this Honorable Court on June 29, 1976.

ARGUMENT

The petitioner stands convicted of bribery. Bribery is

[2] The extent of the scheme was revealed indirectly by the fact that, although the Tourway Inn was mentioned by the petitioner to only one of the state's witnesses, the petitioner had a pass key to the rooms of that motel and an arraignment with the management whereby back rooms were made available to him on a regular basis without the petitioner's registering. (R. pp. 595-600)

[3] The Southern Reporter dates this order March 9, 1976. 329 So 2d 596. However, the order was, in fact, issued on April 9, 1976.

one of the most serious of crimes; in addition to its immediate effects, it tends to undermine public confidence in the Government in an invidious way. The basic principle of our system of government is that of equal protection of the law. Yet, what equality can there be if the laws are prostituted through bribery? And, since bribery is by its nature a secret crime, the victims of the unequal treatment can not protest it. For the same reason, bribery is an extremely difficult crime to detect and prove. The witnesses to the bribe itself are invariably conspirators who have a vested interest in secrecy and a Constitutional right against self incrimination. These considerations, coupled with the fact that the gravamen of the offense is the corruption of a public office rather than the actual giving of the consideration which may under other circumstances be perfectly legal, led the Alabama Legislature to define as bribery the accepting or agreeing to accept a consideration in return for an act by a public official. This is identical in substance to the Federal bribery statute. 18 U.S.C. 203(a).

The petitioner argues that there is no evidence whatsoever that he agreed to accept sexual favors from Mrs. Braidfoot in return for his favorable ruling on her case. He argues that Mrs. Braidfoot is an ex-convict, which she is, and a person of low moral character, which she may be, although her character was sufficiently high to prevent her submitting to the petitioner's scheme. Matters relating to a witness' character go to the weight to be given the witness' testimony, which is question for the jury.

The petitioner spotlights Mrs. Braidfoot's statement:

> "He [i.e. the petitioner] said if I met him at Kings Inn we could talk about the situation and maybe take care of it [i.e. her case]." (R. p. 187)

The petitioner argues that this statement does not comprise an offer to accept sexual favors from Mrs. Braidfoot in return for a favorable ruling on her case.

It must be observed at this point, that if the prosecution were required to prove that the parties to a bribe entered a specific agreement stating in so many words that the bribe giver was to give such and such as a bribe in return for specific action by the bribe receiver, bribery prosecutions would be impossible. There have been few if any bribery cases in history where the bribe was called a bribe, the words "gift", "contribution", "honorarium", "loan" or similar words are invariably used to tag the bribe. This salves the consciences of the participants and makes proof more difficult. As often as not the consideration for the bribe is not specific at all; the bribe may be designed to generally influence official acts rather than obtain a specific act or omission. See 12 Am. Jur. 2d, Bribery, Sections 6, 7, 8, 9 and 10.

Turning to Mrs. Braidfoot's statement, we find that the petitioner asked her to meet him at a motel. The petitioner knew Mrs. Braidfoot only as a defendant in his court. When a man asks a woman to meet him at a motel or hotel, it is commonly understood now-a-days that he is inviting her to an assignation. The petitioner advised Mrs. Braidfoot that maybe they could "take care" of her case. The expression "to take care of a case" means in common parlance, to settle or otherwise dispose of a case in a mutually acceptable manner. The statement, ". . . we could talk about the situation . . ." connects the proposed tryst and the proposed settlement. It would take extreme naivete to avoid reading this statement as an offer to exchange favorable judgment for sexual favors.

Mrs. Braidfoot understood the petitioner to be offering

favorable judgment for sexual favors, and reported it to her lawyer. The lawyer so understood the petitioner's offer and waived his client's right to a preliminary hearing to get her case out of the petitioner's court.

Mrs. Braidfoot's testimony in and of itself was sufficient to support the verdict, but the evidence went further and showed a similar pattern with other women, including cases where the bribery scheme was actually consummated. This evidence tended to show that Mrs. Braidfoot's understanding of the petitioner's statement was accurate.

The petitioner has cited numerous cases, none in point, for the proposition that where there is no evidence of an essential element of the corpus delecti a conviction violates due process. Many of these cases involve political and social desent. *Gregory v. Chicago,* 394 U.S. 111, 22 L. Ed 2d 134, 89 S. Ct. 946 (1969); *Brown v. Louisiana,* 383 U.S. 131, 15 L. Ed 2d 637, 86 S. Ct. 719 (1966); *Shuttlesworth v. Birmingham,* 382 U.S. 87, 15 L. Ed 2d 176, 86 S. Ct. 211 (1965); *Barr v. Columbia,* 378 U.S. 146, 12 L. Ed 2d 766, 84 S. Ct. 1734 (1964); *Taylor v. Louisiana,* 307 U.S. 154, 8 L. Ed 2d 395, 82 S. Ct 1188 (1962); *Garner v. Louisiana,* 368 U.S. 157, 7 L. Ed 2d 207, 82 S. Ct. 248 (1961). All of these cases were prosecutions for *mala prohibita* offenses. *Shuttlesworth v. Birmingham,* supra (blocking a sidewalk) *Vachon v. New Hampshire,* 414 U.S. 478, 38 L. Ed 2d 666, 94 S. Ct. 664 (1974) (contributing to the delinquency of a minor), *Garner v. Louisiana,* supra, *Taylor v. Louisiana,* supra, *Barr v. Columbia,* supra, *Brown v. Louisiana,* supra, (disturbing the peace) *Gregory v. Chicago,* supra, *Thompson v. Louisiana,* 362 U.S. 199, 4 L. Ed 2d 654, 80 S. Ct. 624 (1960). (Disorderly conduct), *Johnson v. Florida,* 391 U.S. 596, 20 L. Ed 2d 838, 88 S. Ct. 1713 (1968) (vagrancy). Bribery is a *mala*

in se offense, the gravamen of which is the corrupt influence of official actions. 12 Am. Jur. 2d, Bribery, Section 1. On this ground alone these cases are distinguishable from the petitioner's case.

More importantly, each element of the corpus delecti was proven against the petitioner. That corpus delecti is:

I. The accused is a Legislative, Executive or Judicial official who

II. accepts *or* agrees to accept

III. any gift, gratuity *or* other thing of value or promise of the same

IV. under an agreement *or* with the understanding that

V. his act, vote, opinion, etc. be given in

VI. any particular manner or upon any particular side of any cause, etc.

It is conceded that the petitioner was a Judicial officer. The evidence clearly showed that he agreed to accept a thing of value (Mrs. Braidfoot's sexual favors) with the understanding that his acts would be on the side of her cause. To reach any other conclusion would require disregarding Mrs. Braidfoot's testimony. This testimony was heavily corroborated and accepted by the jury. Clearly, the evidence proving the petitioner's guilt was weighty; it met and far exceeded the Constitutional minimum of some evidence.

CONCLUSION

In conclusion the State of Alabama respectfully submits

that the order, judgment and opinion of the Court of Criminal Appeals of Alabama are patently correct, and the State prays that the writ be denied.

Respectfully submitted,

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APPENDIX

INDICTMENT

STATE OF ALABAMA
CIRCUIT COURT, FEBRUARY TERM, 1973
MADISON COUNTY

The Grand Jury of said County charge, that before the finding of this indictment,

COUNT ONE

Thomas D. McDonald, alias Tom McDonald, a judicial officer, to-wit: Judge of the Madison County Court, Huntsville, Madison County, Alabama, did in, to-wit: December, 1971, in or near the office of the said Thomas D. McDonald, alias Tom McDonald, in the Courthouse of Huntsville, Madison County, Alabama, unlawfully and corruptly accept or agree to accept a gift, gratuity or other thing of value, or a promise to do an act beneficial to the said Thomas D. McDonald, alias Tom McDonald, to-wit: Sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship from one Myra Layton Braidfoot, alias Myra Braidfoot Layton, a woman, under an agreement or with an understanding that his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, question, or proceeding, which by law was pending before him in his official capacity, to-wit: The cause, question or proceeding being a criminal prosecution of said Myra Layton Braidfoot, alias Myra Braidfoot Layton, wherein the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, was charged with Grand Larceny under the laws of the State of Alabama, and said criminal prosecution being otherwise identified as the *State of Alabama vs.*

Paul Duane Braidfoot, Myra Layton Braidfoot, Defendants, Case No. 97467, Madison County Court, Huntsville, Madison County, Alabama, and that the said Thomas D. McDonald, alias Tom McDonald, as Judge of the Madison County Court, Huntsville, Madison County, Alabama, would dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, reduce or caused to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial to the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, all against the peace and dignity of the State of Alabama.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General, one of the attorneys for the State of Alabama, Respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this day of —— of ————, 1976, I did serve the requisite number of copies of the foregoing Brief and Argument and Appendix on the Attorney for the Petitioner, by mailing the same to him, first class postage prepaid, and addressed to him as follows:

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